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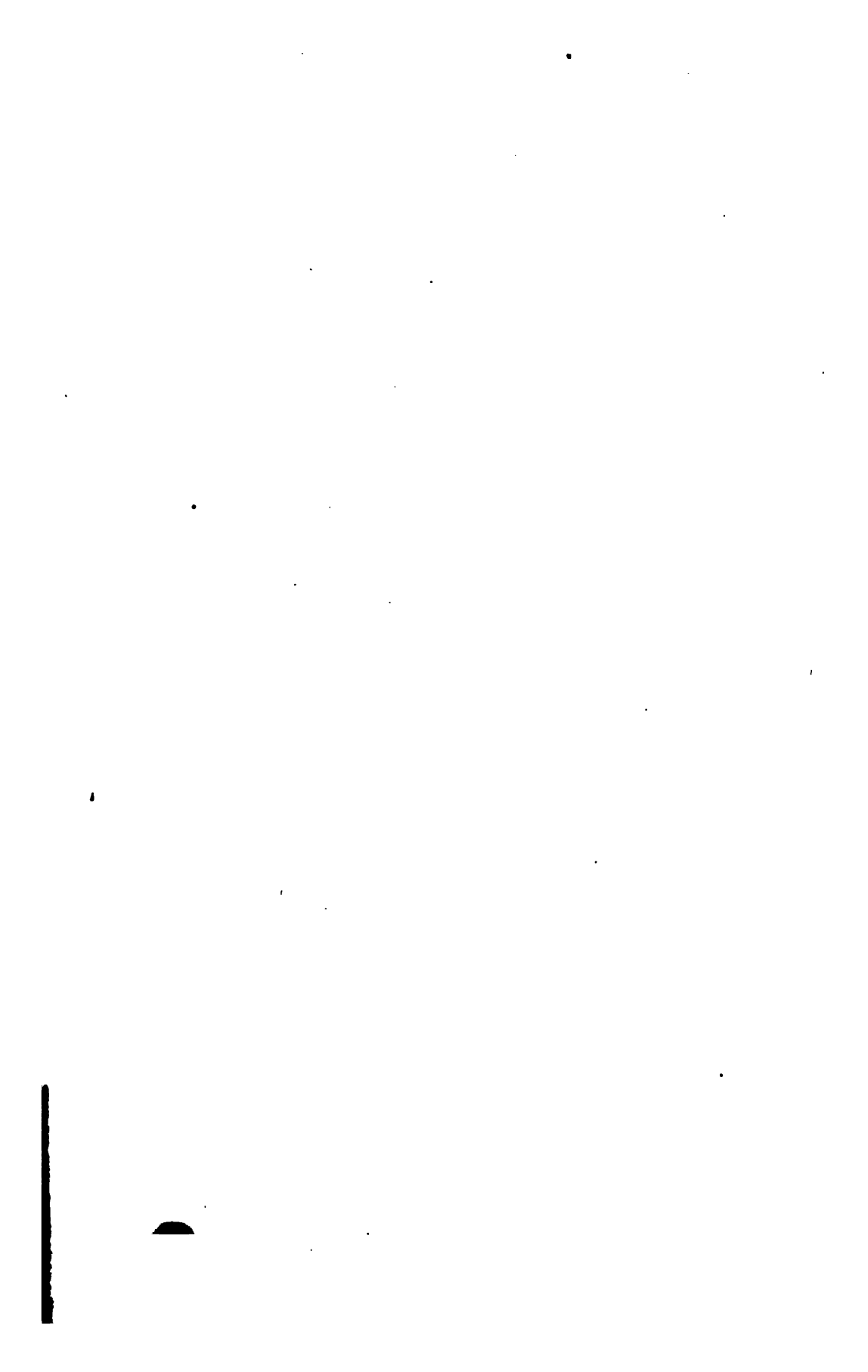
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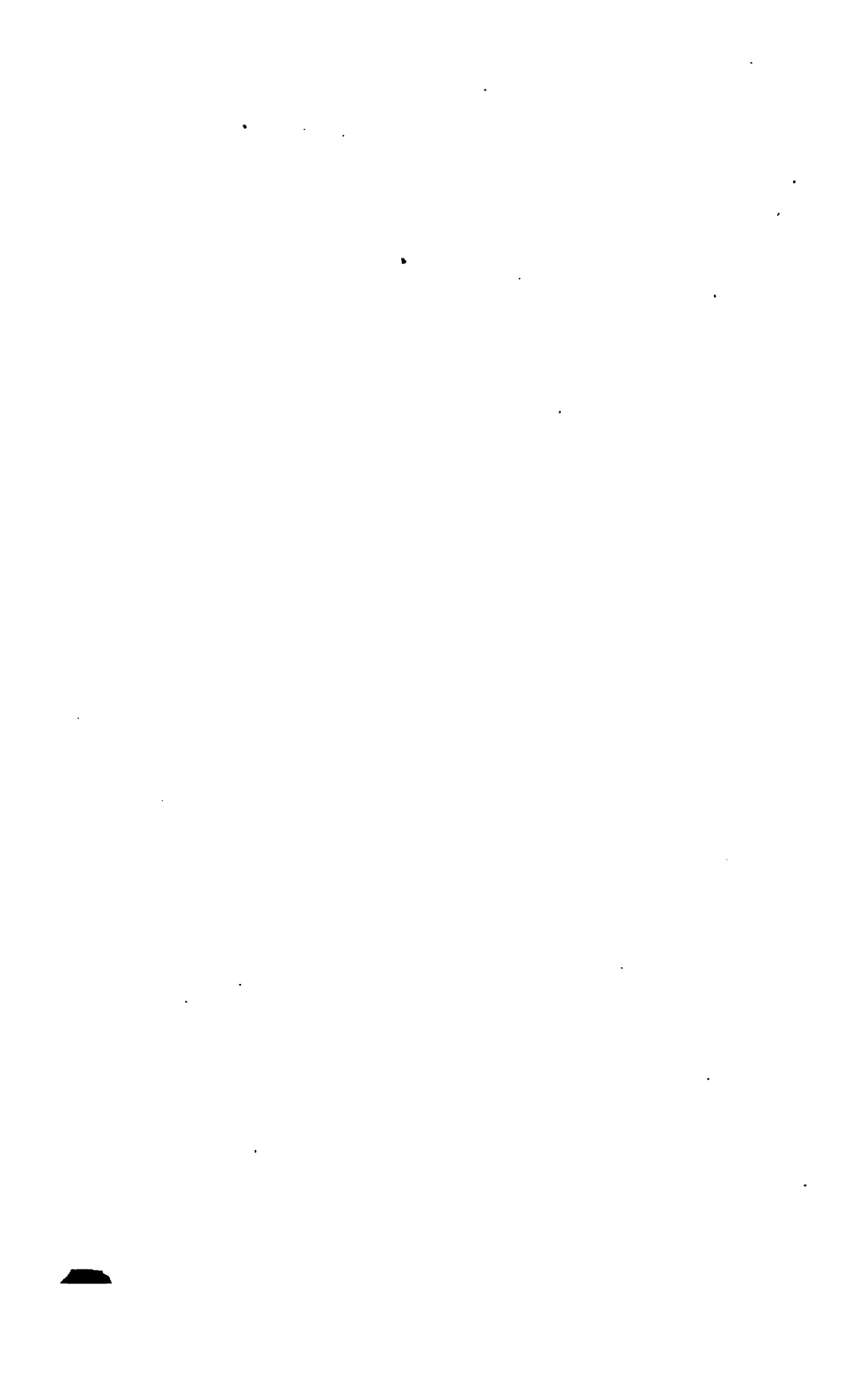


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*Sup. Ct. of Bankr. & Insolvency* THE  
**BANKRUPTCY AND INSOLVENCY  
REPORTS ;**

BEING

**REPORTS OF CASES**

ARGUED AND DETERMINED BEFORE

THE COURT OF APPEAL IN BANKRUPTCY, THE COURT  
OF BANKRUPTCY,

AND

THE COURT FOR THE RELIEF OF INSOLVENT DEBTORS,

TOGETHER WITH REPORTS OF CASES

CARRIED

BY APPEAL FROM THE COURT OF APPEAL IN BANKRUPTCY

TO

THE HOUSE OF LORDS.

VOL. I.

EASTER TERM 1853, TO MICHAELMAS TERM 1854,  
16 & 17 VICT., AND 17 & 18 VICT.

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**JUDGES AND LAW OFFICERS,**  
**FROM EASTER TERM, 1853, TO MICHAELMAS TERM, 1854.**

---

**LORD CHANCELLOR.**

**The Right Honourable LORD CRANWORTH.**

**LORDS JUSTICES.**

**The Right Honourable Sir JAMES LEWIS KNIGHT BRUCE,**  
**Knt.**

**The Right Honourable Sir GEORGE JAMES TURNER, Knt.**

**COMMISSIONERS OF THE COURT OF BANKRUPTCY.**

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**JOHN SAMUEL MARTIN FONBLANQUE, Esq.**

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**ATTORNEY-GENERAL.**

**Sir ALEXANDER COCKBURN, Knt.**

**SOLICITOR-GENERAL.**

**Sir RICHARD BETHELL, Knt.**

---

**MEMORANDUM.**

**HENRY REVELL REYNOLDS, Esq., Chief Commissioner of the Court for the Relief of Insolvent Debtors, resigned office on the 28th day of July, 1853; whereupon WILLIAM JOHN LAW, Esq., a Commissioner of that Court, was appointed Chief Commissioner.**

**FRANCIS STACK MURPHY, Esq., Serjeant-at-Law, was, on the 28th day of July, 1853, appointed a Commissioner of the Court for the Relief of Insolvent Debtors.**

The Cases comprised in this Volume have been reported by the following Members of the Bar : —

HOUSE OF LORDS - { WILLIAM HEATH BENNET, of  
LORD CHANCELLOR - { Lincoln's Inn, Esq.

LORDS JUSTICES - { GEORGE STEVENS ALLNUTT, of  
the Middle Temple, Esq., and  
HENRY CADMAN JONES, of  
Lincoln's Inn, Esq.

COURT OF BANKRUPTCY { ADAIR ANDREW DORIA, of Lin-  
coln's Inn, Esq., and JOHN  
WILLIAM MARTIN FON-  
BLANQUE, of the Middle  
Temple, Esq.

COURT FOR THE RELIEF { ERNEST HAYTHORNE REED, of  
OF INSOLVENT DEBTORS { the Middle Temple, Esq.

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THE  
BANKRUPTCY AND INSOLVENCY  
REPORTS.

1853.

IN RE JESSE OLDFIELD. (a)

COURT OF  
APPEAL.  
1853.

**MR. OLDFIELD** was declared a bankrupt upon the petition of Mr. Moses Dodd. The act of bankruptcy relied upon was, that having been summoned for a debt of 122*l*., he had, under the provisions of sect. 82. of stat. 12 & 13 *Vict. c. 106.*, filed an admission as to the sum of 112*l*., part thereof, and an affidavit that he had a good defence upon the merits as to 10*l*., the residue thereof.

At the hearing, Mr. Commissioner *Evans* dispensed with Mr. Oldfield entering into the bond referred to in section 82.

Mr. Oldfield did not pay, or offer to compound for the 112*l*. within seven days after the filing of such admission, and at the expiration of that period was declared a bankrupt. The case subsequently came on for hearing before Mr. Commissioner *Goulbourn*, on a notice to dispute the adjudication, when the adjudication was confirmed as to the act of bankruptcy under the eighty-second section, and also on an alleged keeping house for the purpose of delaying creditors, as to which the evidence was conflicting. From this decision Mr. Oldfield appealed, and denied both acts of bankruptcy; the one under section 82. as being insufficient in law; the other, as being contrary to fact.

Mr. *Sturgeon* for the petitioner, contended, he had not committed an act of bankruptcy within the meaning of the eighty-second section, which provides that if a trader, when summoned, shall upon his appearance sign an admission of part only of the demand, in the form prescribed by the act, and shall not make a deposition in the form therein prescribed, that he believes he has

*Oct. 27. 1852.*  
*Feb. 18. 1853.*

Where a party, summoned to pay a debt under sect. 78. of stat. 12 & 13 *Vict. c. 106.*, files an admission as to part of such debt, and makes an affidavit pursuant to sect. 82. of the same statute, that he has a good defence upon the merits as to the residue thereof, and the Court dispenses with his entering into the bond referred to in the same section, such party does not commit an act of bankruptcy by not paying, within seven days after the filing of such admission, the portion of the debt so admitted.

(a) Reported by Mr. Sturgeon.

1853.  
IN RE JESSE  
OLDFIELD.

a good defence upon the merits, to the residue of such demand, and, *if required by the Court so to do*, enter into such bond as therein mentioned, then, if such trader, as to the sum so admitted, shall not within seven days next after the filing of such admission, pay or tender, or offer to pay the same, he shall be taken as having committed an act of bankruptcy. In the present case, the petitioner did make the required affidavit. He was ready to enter into the bond, if the Commissioner had not dispensed with his doing so. Whatever doubt might exist as to the construction to be placed upon the eighty-second section, is explained by the seventy-ninth of the rules and orders, which provides "that if the party summoned shall make an affidavit in the form contained in Schedule K., that he has a good defence to part of the demand, he shall be entitled to his discharge from the summons, and to have a memorandum of such discharge endorsed on the summons."

Mr. *Headlam* and Mr. *J. V. Prior* for the petitioning creditor.

If the construction contended for were to prevail, no man could be made a bankrupt under section 82., except in the extreme case of a party contumaciously refusing to make any affidavit, which never could have been the intention of the legislature; that intention was, that a person might be made a bankrupt who did not pay or compound for the admitted portion of the demand. The section was evidently framed to meet a great inconvenience, which constantly occurred under the previous Act, where parties declared they had a good legal defence to some fractional part of the demand, upon which, the summons was dismissed. The later act requires the party summoned to swear he has a good defence upon the merits, showing that the attention of the legislature had been directed to the point.

Their Lordships, after consultation, declined to annul the adjudication upon the evidence then before them, but gave the petitioner leave to try two issues at law; one whether he had committed an act of bankruptcy by keeping house with a view to delay his creditors; the other, whether he had committed an act of bankruptcy by not complying with the terms of the statute (*a*), intimating that they considered the point raised upon

(*a*) These issues were tried at the Guildhall before Mr. Baron Martin and a special jury, when a verdict was found for the petitioner upon the first issue, and for the petitioning creditor upon the second issue. Subsequently the cause (*Oldfield v.*

*Dodd*) came before the Exchequer Chamber, upon a writ of error, when the Court held that no act of bankruptcy had been committed under section 82.; and on the matter again coming on for hearing before the Court of Appeal in Bankruptcy,

the construction of the 82nd section so important, that if it came back for their decision they should request the assistance of the Lord Chancellor at the hearing.

Solicitors, — for the petitioner Mr. *Hadwen*. For the petitioning creditor Messrs. *Phillips* and *Voss*.

1853.  
IN RE JESSE  
OLDFIELD.

## RE WILLIAM JONES.

Before Mr. Commissioner LAW.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

April 1.

IN January, 1853, the insolvent had been arrested at the suit of a Mr. Massey, a solicitor, to whom he had given a judge's order for the payment of 25*l*., alleged to be due for professional services. In August, in the preceding year, the insolvent being in great difficulties, had, by the advice of Massey, called two meetings of his creditors for the purpose of offering a composition; each of which meetings terminated unsuccessfully. Before and after the month of August, the insolvent had been proceeded against both in the Superior Courts and County Courts, and judgments had been obtained against him in several actions: on cross-examination, he admitted, that Massey had been his solicitor for two years, and at the moment of his arrest was still acting for him in several matters.

It is not an inflexible rule, that the petition of an insolvent will be dismissed, where the arrest is friendly, and there are no assets to be divided amongst the creditors.

Mr. *Stammers* for a creditor, submitted that the petition must be dismissed, the arrest was friendly, and there were no assets for creditors: in such a case it was the invariable practice of the court to dismiss the petition.

Mr. *Reed* for the insolvent, was stopt whilst arguing the question of the arrest being friendly.

Mr. Commissioner LAW. It is clear beyond all doubt that the arrest is friendly; but I shall not dismiss the petition on that account. It is also clear that the insolvent is in great difficulties. Both before and after August, he was sued; and several of his creditors got judgments against him. I shall sustain the petition.

The case was afterwards adjourned to produce witnesses.

Attorney for the opposing creditor *George*.  
for the insolvent *Foster*.

their lordships (Sir J. L. Knight Bruce and Sir G. J. Turner) made an order superseding the bankruptcy, and directed the costs of the pro-

ceedings both at law and in bankruptcy to be paid by the petitioning creditor.

COURT OF  
BANKRUPTCY.  
1853.

April 4.

Petitions for  
adjudication  
must be on  
parchment.

## ANONYMOUS. (a)

Before Mr. Commissioner EVANS.

**MR. VINING** applied for leave to file a petition for adjudication, which had been engrossed upon paper.

*Per curiam.* — This petition cannot be received. — It should have been written or printed on parchment, under the provisions of Rule 2. of the Rules and Orders (b).

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

April 9.

A. and E. having entered into recognisances for the appearance of an insolvent at a county court.

*Held*, that this Court may issue a warrant, for the estreat of such recognisances, the insolvent not having appeared according to the order for hearing.

*Held*, also, that the rule is absolute in the first instance.

## RE JAMES SIMONS.

Before Mr. Commissioner PHILLIPS.

**MR. COOKE** moved upon the affidavit of William Hayes, a solicitor, that the recognisances entered into by the insolvent, and also by Thomas Eaves, and John Adrian, both of the city of Coventry, as sureties for his appearance at the hearing of the case, be forfeited, the insolvent not having appeared according to the order for hearing, and that a warrant of distress do issue for recovering the sum of 30*l.*, the amount secured in the said recognisances, in a summary way, by a distress and sale of the goods and chattels of such sureties, as the court shall by its order direct; and that the amount so recovered shall be applied for the benefit of the creditors of the insolvent in like manner as if the same were part of his estate and effects; and also that a warrant be issued authorising A. and B. to apprehend and arrest the said Thomas Eaves, and John Adrian, and deliver them into the custody of the goaler and keeper of the goal of Coventry, from whose custody the said John Simon was taken and discharged on such recognisances (c).

Mr. Commissioner PHILLIPS. You can take a rule absolute. Rule granted.

Attornies, *Richards and Walker.*

(a) Reported by Mr. Sturgeon.

(b) By section 48. of statute 12 & 13 Vict. c. 106. it is enacted "That every document enumerated in Schedule C. to that act annexed shall, from and after the commencement of that act, be printed or written upon vellum, parchment, or paper." Section 8. of the same act empowers the commissioners to make such rules and orders as they may think fit for the better carrying that act into execution, and "generally for regulating the practice of the court and the

forms of proceedings, where not provided for in that act."

Rule 2. of the Rules and Orders directs "every petition for adjudication of bankruptcy to be fairly written or printed on parchment."

*Quere*, is a rule confining a petition to being written or printed on parchment within the authority conferred by section 8. of statute 12 & 13 Vict. c. 106.

(c) The rule granted by the Court was absolute in the first instance; but it is understood that it was subsequently altered to a rule nisi.

## RE ROBERT WATTS.

Before Mr. Commissioner LAW.

**MR. NICHOLLS**, for the opposing creditor.**Mr. Sargood**, for the insolvent.

The insolvent, a baker, had been arrested for a debt of 22*l.* 7*s.* 6*d.*, for which he had given a bill of exchange as security. A second detainer had been lodged against him by the opposing creditor. On cross-examination, the insolvent admitted having received but 3*l.* from the detaining creditor, which was the only consideration for the bill.

**Mr. Commissioner LAW.** I have no jurisdiction.  
Petition dismissed.

**Attorney for the opposing creditor** *Clerk.*  
for the insolvent *Clarke.*

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

1853.

April 2.

Where the sum for which an insolvent is arrested, is partly fictitious, to raise the debt above 20*l.*, the Court has no jurisdiction, although a second creditor has lodged a detainer.

## RE SAMUEL FREDERIC RAY.

Before Mr. Commissioner LAW.

**IN** 1833, the insolvent had been discharged by this court from debts amounting to 4277*l.* 9*s.*; at the time of his arrest he held a situation in the Navy Office, Somerset House, at a salary of 280*l.* per annum, which shortly after his discharge was abolished, and a pension of 140*l.* granted to him as compensation. In 1833, it was ordered that the sum of 44*l.* should be deducted from his pension annually, for the payment of his debts. In July 1839, a dividend was paid of 10*d.* in the pound. And in August of the succeeding year, an application was made and granted, that the deduction of 44*l.* should be reduced to 30*l.* In June 1845, a further dividend of 11½*d.* in the pound was declared. In October 1851, through the death of a relative, the insolvent became entitled as next of kin to a moiety of two leasehold houses, his share producing 418*l.* 19*s.* 3*d.*, which he voluntarily surrendered to the provisional assignee, for the benefit of his creditors.

A rule nisi having been granted on the above facts, calling on the creditors to shew cause why the payment of 30*l.* per annum, should not be discontinued,

**Mr. Reed** now appeared to make the rule absolute.

Two creditors in person shewed cause.

**Mr. Commissioner LAW.** Taking the government pay from

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

April 11.

R., having voluntarily surrendered to the provisional assignee 418*l.* 19*s.* 3*d.*, to which he had become entitled as next of kin, twenty years after his insolvency, it was ordered, on application, that the sum of 30*l.* which had been deducted from his pension, annually, for the benefit of his creditors should be discontinued.

1853.

RE SAMUEL  
FREDERIC RAY.

an insolvent is not a matter of course, but lies in the discretion of the court, and if the insolvent had, before he surrendered the 400*l.*, applied to know if he would be relieved for the future from the annual deduction from his salary, I should have said it would be fair on the creditors to do so. I think no one would hesitate to say so; and I do not think it less fair because the payment was voluntary. He might have kept the whole amount, though certainly the creditors would have had the right to call upon him to deliver it up; yet even then the court would not have obliged him to surrender the whole sum. I see on referring to the provisional assignee's book, there is a dividend of 2*s.* 10*d.* ready to be paid. I therefore think it quite fair, whatever might have been the insolvent's original faults, that he should be relieved from the payment of the 30*l.* for the future.

Rule absolute.

Attorney, *Forbes*.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

April 16.

Where a petitioner for protection is an uncertificated bankrupt, in estimating the amount of his debts, those owing under the bankruptcy must be included.

RE EMANUEL NEWCOMB.

Before Mr. Commissioner PHILLIPS.

THIS insolvent, a baker, had been declared a bankrupt in the year 1830, but he had not obtained a certificate; his debts at that period amounted to 1800*l.*, and he now petitioned as a trader owing less than 300*l.*

Mr. *Dowse* for the insolvent.

Mr. Commissioner PHILLIPS, in looking over the schedule, observed that he had no jurisdiction. The insolvent was an uncertificated bankrupt, and the amount of his debts precluded the court from entertaining the case.

Petition dismissed.

Attorney, *Turner*.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

April 16.

In estimating the amount of a trader's debts, upon an application for protection, those owing under a former insolvency must be included.

RE EDWARD TAFT.

Before the Chief Commissioner.

IN 1849, the insolvent had been discharged from debts amounting to 5000*l.* and upwards. Since that period he had contracted fresh liabilities to the amount of 194*l.* 19*s.* 4*d.*, from which he now sought protection.

Mr. *Reed* submitted that the petition must be dismissed, and

contended that the discharge in 1849 neither released nor discharged the debts then owing, it only barred the remedy (a).

The Chief Commissioner dismissed the petition.

Attorney for the opposing creditor, *Cooper*. For the insolvent, *Marshall*.

(a) But see *contrà*, *Re James Parsons*, 6 L. T. 455.; *Re James Henry Hance*, 11 L. T. 330.; and *Re John Roby*, 11 L. T. 354.

1853.  
RE EDWARD  
TAFT.

## RE WILLIAM WEYMOUTH.

Before Mr. Commissioner LAW.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

April 16.

THIS insolvent had petitioned the Court under the Protection Statutes in 1848, and had made an offer of 80*l.* per annum, payable by quarterly instalments of 20*l.*, for the benefit of creditors. The proposal was embodied in the final order, no payment whatever having been made pursuant to the terms of the final order.

Mr. *Cooke*, on a former day, on behalf of a creditor named Arden, whose debt amounted to 900*l.*, obtained a rule, calling on the insolvent "to shew cause why he should not be committed for his contempt in not making payments to the official assignee according to the directions contained in the final order, obtained by him and made pursuant to the proposal of the said William Weymouth, submitted by him to the Court in his petition."

Mr. *Sargood* now shewed cause. The object of the rule was to enforce certain payments to the official assignee, and it gave rise to important considerations, inasmuch as it involved a contempt of Court, yet framed as the rule was at present and resting on its present affidavit, it was submitted it must be discharged; and firstly, it was objected that the nonfulfilment of the proposal contained in the final order was no contempt of Court, inasmuch as that proposal had never been made an order of the Court; but, if it was an order, then it was clear the application for the committal of the insolvent for the contempt of it, could only be made by the party injured. If there was a rule or order of Court, it could only be the order at the foot of the rule, that is, that the insolvent should make certain payments to the official assignee; the assignee, therefore, was the party injured, and consequently the person who should have made the application. The question of attachment must rest exclusively on the matter alleged in the affidavit, and the Court

W. having made a proposal of 80*l.* per annum, payable by quarterly instalments of 20*l.* for the benefit of creditors, which was embodied in his final order.

*Held*, that the non-payment of such instalments, pursuant to the terms of the final order, is a contempt of Court, for which the insolvent may be committed.

*Held*, also, that any creditor of an insolvent is entitled to make the application for the attachment.

Lastly, that it is not a necessary preliminary to the granting of the attachment, that there should be a personal service on the insolvent, and a demand made to perform the act for which it is sought to commit him.

1853.  
 RE WILLIAM  
 WEYMOUTH.

has no power to found a judgment on matter not there alleged, and in the exhibit annexed to it. Although the application was made by Arden, the affidavit did not allege that he was a creditor; it did not even allege that he had authority to represent a creditor; and it would be inconsistent with common sense and common justice that a person not a creditor should be heard on such an application. It was submitted that the Court could not find proof of any fact that ought to have been alleged in the affidavit, by looking out of it into the schedule, but even supposing that this were incorrect, and the Court did look into the schedule, the right of Arden to be a creditor was there disputed. In the case of *Harrison v. Ward* (a), the Court founded its objection to the sustaining of an application for an attachment, on the ground that a certain undertaking was not alleged in the judge's order for taxation, although the Court well knew by its practice that the order could not have been obtained without the party applying for it giving such an undertaking. That case sufficiently proved the Court could not officially conclude in the absence of the fact being alleged that Arden was a creditor. If it was essential that the applicant here should be a creditor it was also essential that the fact should be alleged; and though the Court may feel convinced of his acting in that capacity, yet, as it was not alleged, the conviction alone was insufficient. For aught that appeared to the contrary, Arden was a total stranger to the insolvent, and it was submitted on this point that the rule must be discharged. [Mr. Commissioner *Law*. I shall go on. In the case mentioned there was a different point; there, as I understand it, the affidavit did not show that a contempt had been committed; here it does.] Secondly, before there could be a contempt for which an attachment would lie, there must be a rule of Court. This was a mere direction, not so much that a certain thing should be done as the manner of doing it. Although called a final order, it neither commanded any one to do anything, nor to abstain from doing anything. How then could it be called an order? [Mr. Commissioner *Law*. Those who framed the final order have omitted the word "order" and used the word "direct." ] That did not make it an order and was insufficient. *Baker v. Rye* (b); *Re Turner* (c). [Mr. Commissioner *Law*. The final order was not only a rule of Court, but a statutable one. The 1 and 2 Vict. c. 110. empowered the Court to commit for disobedience of a rule or order.] The Court was not acting now under that act of parliament, and the

(a) 3 Dowl. 541.  
 (b) 1 Dowl. 689.

(c) 6 Dow. 6.



powers there given could not apply to this case. It was nowhere expressed in these acts of Parliament that the Court was empowered to commit for contempt of its order; and arguing by analogy to the Bankruptcy Laws, it had no such power. Previous to the year 1840 that Court could not enforce any order it might have made until the order was sanctioned by higher authorities; *Rex v. Falkner* (a); and now by 12 & 13 Vict. c. 106. s. 266. it could only enforce its orders by an express sanction to that effect. It was therefore submitted on this point also that the rule must be discharged. Thirdly, there had been no personal service and no demand made on the insolvent to perform the act for which it was sought to commit him; *Evans v. Millard* (b), *Brown v. Jenks* (c), *Stumel v. Tower* (d), *Doddington v. Hudson* (e), *Brandon v. Brandon*. (f) Another point of importance was, Had the Court any jurisdiction to make an order on an insolvent unless he was a consenting party? [Mr. Commissioner Law. You say, although he made the proposal he did not consent to it.] It was further contended that verbal accuracy was necessary, and that the direction in the final order should follow the proposal *in totidem verbis*.

Mr. Cooke was not called on to support the rule.

MR. COMMISSIONER LAW said he was unconvinced by the argument. He could see no difficulty yet, except in the question of debt. Certainly Mr. Arden must prove his debt: the Court would expect him to do so, because, for anything the Court knew, the insolvent might owe him nothing, and therefore it was reasonable to call upon him to prove his debt; but supposing him an admitted creditor, he should have no hesitation in making the rule absolute.

Rule absolute upon proof of debt by Mr. Arden.

Attorney for the rule *Johnson*; against the rule, *Lewis & Lewis*.

(a) 4 L. J. Exch. 311.

(b) 4 L. J. Exch. 156.

(c) 4 Dowl. 581.

(d) 3 L. J. Exch. 353.

(e) 1 Bing. 410.

(f) 1 L. J. C. P. 46.

1853.  
RE WILLIAM  
WEYMOUTH.

1853.

IN RE LACY, EXPARTE THE COMMERCIAL  
BANK OF LONDON.COURT OF  
BANKRUPTCY.

Before MR. COMMISSIONER GOULBURN.

May 4.

The value of forfeited shares in a banking company is to be estimated at their market price at the time of forfeiture, or at that at which they were re-issued, and not by the amount actually paid upon them in the company's books.

THE bankrupt, prior to his bankruptcy, held fifty shares in the Commercial Bank, in respect of which he had paid 1000*l*. (being a deposit of 20*l*. per share) in compliance with the requisitions of the company's deed of settlement. By clause 83. of the deed it was provided, that "the shares of every shareholder shall, before and in preference to every other right or claim whatsoever, be subject to and charged with all debts, liabilities, and engagements due from and subsisting between him and the company, and that the directors may, and they are hereby empowered to cancel and extinguish, and declare forfeited, or to sell and dispose of the shares of any shareholder, either wholly or in part as the case may seem to require, by way of or towards satisfaction or liquidation of all or any part of such debts, liabilities or engagements." By clause 87. after the execution of the deed of settlement, "any shareholder, whether by marriage, &c., or as assignee in bankruptcy or insolvency, or otherwise, may sell and transfer all or any of the shares of such shareholder, subject nevertheless to the approbation of the directors." The petition for adjudication bore date the 23rd April, 1852; notice was given to the bank in August following; and about the same time a dividend was declared in favour of the shareholders. On the 7th September a resolution of the directors was passed declaring the bankrupt's shares forfeited pursuant to clause 83. of the deed, and authorising the manager of the bank "forthwith to credit the account of the bankrupt in the company's books with the full amount of his shares as they appear on the share register of the company." In February, prior to the bankruptcy, a bill of exchange for 1500*l*., payable at four months, was drawn by Lackerstein & Co. upon, and accepted by the bankrupt. This bill was discounted at the Commercial Bank, and on arriving at maturity was dishonoured. The Commercial Bank now sought to prove against the estate for 500*l*. (the balance due upon the said bill after deducting 1000*l*.), the amount of the deposit paid by the bankrupt upon his fifty shares.

Mr. *Aspland*, for the assignees, resisted the proof, and contended that the shares having greatly increased in value since they were first issued, the bankrupt's estate was entitled to the benefit, and should be credited with the present increased market-value of

the shares, as also with the dividends declared thereon in August last.

Mr. *Pearson*, for the Commercial Bank, argued, that the amount appearing by the company's books to have been paid upon the shares was the only criterion of value to be attached to them as between them and the bankrupt.

The manager of the bank was called to prove the market-value of the shares at the time of the forfeiture and at the present time, and also that other shares had been issued by the company in lieu of the bankrupt's shares, which last had been cancelled.

Upon an intimation from the Court, that the market-value of the shares at the time of the forfeiture was to be taken as the true value thereof, it was agreed to credit the bankrupt's estate, by way of set-off, with the value of the shares at the price at which they were re-issued by the company, and also with the amount of dividends declared in August, 1852; subject to which deductions the proof was admitted.

Solicitors, *Amory, Travers, & Smith*; and *Reed, Langford, & Marsden*.

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IN RE LACY,  
EX PARTE THE  
COMMERCIAL  
BANK OF  
LONDON.

## RE WILLIAM MINNETT.

Before MR. COMMISSIONER LAW.

THIS insolvent, a fruiterer, greengrocer, and dealer in coals, had filed a petition under the protection statutes on the 7th April, and obtained his interim order of protection. On the 9th day of April, pursuant to a judgment summons at the suit of William Townsend, a creditor whose debt was set out in the schedule, he had appeared before the judge of the County Court holden at Shoreditch, and had produced his interim order of protection, when an order was made that he should be committed to prison for the space of twelve days. On the 11th day of April, in consequence of two other judgment summonses, the insolvent had again appeared before the same county court, and was arrested by the bailiff at the suit of Townsend, and committed to the custody of the keeper of the prison in Whitecross Street.

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DEBTORS.

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A. having been committed pursuant to an order of a county court judge, for the non-payment of a debt set forth in his schedule, from which he was protected from process by an interim order of protection, it was ordered, on application, that he should be discharged.

These facts being verified by the affidavit of the insolvent, MR. COMMISSIONER LAW made an order that the insolvent should be discharged out of custody.

Attorney, *Collins*.

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## CARTER v. DIMMOCK AND OTHERS.

HOUSE OF  
LORDS.Present the LORD CHANCELLOR, LORDS BURLINGTON and  
BYRON.May 6. & 9.  
The 104th section of the 12 & 13 Vict.

c.106. provides, "that before notice of any adjudication of bankruptcy shall be given in the London Gazette, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person; and such person shall be allowed seven days, or such extended time not exceeding fourteen days in the whole, as the Court shall think fit, from the service of such duplicate, to show cause to the Court against the validity of such adjudication," &amp;c. Where, therefore, a

bankrupt does not show cause against the validity of the adjudication before the commissioner within the period prescribed by this section, the commissioner, after that period, has not any authority to entertain an application to review the adjudication under that, or under the 233rd section.

*Held*, also, that a petition to annul the adjudication afterwards presented to the commissioner by the bankrupt, was not such a "proceeding" as was contemplated by the legislature in the 233rd section of the statute.

THIS was an appeal by the alleged bankrupt against an order of the late Lord Chancellor *Truro*, reversing an order of the Vice-Chancellor *Knight Bruce* sitting in bankruptcy.

The respondents were the petitioning creditors of the alleged bankrupt.

The facts of the case are contained in the special case agreed upon by the parties, and which was in the following words:—

"In Bankruptcy. — In the matter of Thomas Carter, of Stafford, in the county of Stafford, corn dealer, dealer, and chapman, against whom a petition of adjudication of bankruptcy hath been filed in the Court of Bankruptcy for the Birmingham district.

*" Special Case.*

"The petition for adjudication of bankruptcy bore date the 15th day of February, 1851, and was filed by Josiah Dimmock, Timothy Dimmock, and Thomas Keeling, as petitioning creditors against the bankrupt in the Court of Bankruptcy for the Birmingham district on the same day; and under such petition the bankrupt was, on the said 15th day of February, adjudged a bankrupt by one of the commissioners acting in the prosecution of petitions for adjudication of bankruptcy at the said court.

"The debt of the petitioning creditors, upon which alone such petition for adjudication was filed, and such adjudication as aforesaid was made, was a certain judgment recovered by the petitioning creditors against the bankrupt in the Court of Exchequer of Pleas at Westminster for the sum of 65*l.* 7*s.* 9*d.*, which judgment was entered up on the 23rd day of July, 1850.

"On the 26th day of July, 1850, the petitioning creditors issued a writ of *capias ad satisfaciendum* directed to the sheriff of the county of Stafford against the bankrupt, upon the said judgment, upon which writ the bankrupt was, on the 30th day of July, 1850, duly taken in execution by the said sheriff, and

committed to the gaol of the said county, in which said gaol the said bankrupt thenceforth remained committed and confined under the said judgment and execution up to and at the time of the filing of the said petition of adjudication of bankruptcy, and the said adjudication thereunder and thenceforth until his discharge as hereinafter mentioned.

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"On the 19th day of February, 1851, a duplicate of the adjudication was duly served on the bankrupt personally, and on the same day the bankrupt was discharged from custody, and under such discharge was released from such custody by the said sheriff.

"The bankrupt did not, within the time allowed under the 104th section of the 12 & 13 Vict. c. 106., show cause to the Court against the validity of the adjudication, and the Court caused notice of the adjudication to be inserted in the London *azette* of Friday the 28th day of February, 1851.

"The first public sitting in the bankruptcy was held on the 16th of March, 1851, on which day the bankrupt surrendered.

"On the 19th day of March, 1851, the bankrupt presented his petition to the Court of Bankruptcy for the Birmingham district and to John Balguy, Esq., a commissioner acting in the prosecution of petitions for adjudication of bankruptcy at the said court, praying that the said petition for adjudication of bankruptcy, or the said adjudication thereunder, might be annulled.

"The said petition was heard on the 14th day of April, 1851, and on that day the Court ordered that the petition of the said bankrupt be dismissed.

"On the 23rd day of April, 1851, the bankrupt presented his petition of appeal to his Honor Sir *James Lewis Knight Bruce*, the vice-chancellor appointed and sitting in bankruptcy, praying that his honor would be pleased to order that the said order of the said Court of Bankruptcy for the Birmingham district, dismissing the bankrupt's petition, might be set aside with costs, and that the said petition for adjudication, or that the said adjudication, might be annulled, or that his honor would be pleased to make such other order in the premises as to his honor should seem fit.

"The last mentioned petition was heard on the 10th day of May, 1851. At the hearing it was contended on behalf of the petitioning creditors, 1st. That as the bankrupt did not, within the time allowed under the 104th sect. of the 12 & 13 Vict. c. 106., show cause to the Court against the validity of the adjudication, his first-mentioned petition to annul the adjudication ought to have been presented to the said vice-chancellor,

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and not to the said commissioner; 2nd. That as the said petition to the said vice-chancellor was not presented either within twenty-one days from the date of the order of adjudication, or within twenty-one days after the notice of the adjudication had been inserted in the London Gazette, such last-mentioned petition was presented too late, and therefore ought to be dismissed; but his honor the said vice-chancellor ordered that the adjudication of bankruptcy made against the said Thomas Carter on the 15th day of February, 1851, should be annulled; and the same was thereby annulled accordingly. And it was ordered that the respondents, the petitioning creditors, should pay to the said petitioner his costs of and occasioned by that application. And it was referred to Wm. Vizard, Esq., an officer of the court, to tax such costs between the parties if they differed about the same.

“The petitioning creditors insist that the said last mentioned order is erroneous in matter of law, and ought to be reversed.”

This special case was heard before Lord Chancellor *Truro* on the 5th and 12th of December, 1851, when his lordship made an order reversing the order of the Vice-Chancellor *Knight Bruce*, and directing that the costs of the petitioning creditors of the appeal and special case should be paid out of the estate and effects of the bankrupt, and that the costs of the petition before the vice-chancellor, which had been paid by the petitioning creditors to the bankrupt, should be returned by him to them.

From this order the bankrupt presented his appeal to this House.

The arguments and decisions of the Vice-Chancellor *Knight Bruce* and of the late Lord Chancellor *Truro* are respectively reported in 15 Jurist, 984; and on appeal, 1 De Gex. M. & G. 212. and 15 Jur. 1142.

The sections of the 12 & 13 Vict. c. 106., on which the question turns, are the following:—

Sect. 12. “That the Court, in exercise of its primary jurisdiction, by virtue of this act shall have superintendence and control in all matters in bankruptcy, and shall hear, determine, and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate and effects of the bankrupt, or of any estate or effects taken under the bankruptcy, and claimed by the assignees for the benefit of the creditors, or relating to any acts done, or sought to be done, by the assignees in their character of assignees, by virtue or under colour of the bankruptcy; and also in any matter of bankruptcy whatever, as between the assignees and

any creditor or other person appearing and submitting to the jurisdiction of the Court, and also in any application for a certificate of conformity, and in any other matter (whether in bankruptcy or not) where the Court, by virtue of this act, has jurisdiction over the subject of the petition or application, save and except as may be by this act otherwise specially provided; and subject in all cases to an appeal to such one of the vice-chancellors of the High Court of Chancery as the lord chancellor shall from time to time be pleased to appoint to sit in bankruptcy: Provided always, that if no such appeal be entered *within twenty-one days* from the date of any decision or order of the Court, and be thereafter duly prosecuted, every such decision or order shall be final; and that every appeal shall be subject to such regulation, in regard to deposit of costs, as shall by any general rule or order to be made in pursuance of this act be directed."

Sect. 104. "That before notice of any adjudication in bankruptcy shall be given in the London Gazette, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt personally, or by leaving the same at the usual or last known place of abode, or place of business of such person; and such person shall be allowed *seven days*, or such extended time, *not exceeding fourteen days* in the whole, as the Court shall think fit from the service of such duplicate, to show cause to the Court against the validity of such adjudication; and if such person shall within such time show, to the satisfaction of the Court, that the petitioning creditor's debt, trading, and act of bankruptcy, upon which such adjudication has been granted, or any or either of such matters are insufficient to support such adjudication, and upon such showing no other creditor's debt, trading, and act of bankruptcy sufficient to support such adjudication, or such of the said last mentioned matters as shall be requisite to support such adjudication in lieu of the petitioning creditor's debts, trading, and act of bankruptcy, or any or either of such matters which shall be deemed insufficient in that behalf, as the case may be, shall be proved to the satisfaction of the Court, the Court shall thereupon order (in the form contained in schedule U. to this act annexed, or to the like effect) such adjudication to be annulled, and the same shall by such order be annulled accordingly; but if, at the expiration of the said time, no cause shall have been shown to the satisfaction of the Court for the annulling such adjudication, the Court shall forthwith, after the expiration of such time, cause notice of such adjudi-

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cation to be given in the London Gazette, and shall thereby appoint two public sittings of the Court for the bankrupt to surrender and conform, the last of which sittings shall be on a day not less than thirty days, and not exceeding sixty days, from such advertisement, and shall be the day limited for such surrender: Provided always, that the Court shall have power from time to time to enlarge the time for the bankrupt surrendering himself, for such time as the Court shall think fit, so as every order be made six days at least before the day on which such bankrupt was to surrender himself," &c.

Sect. 233. "That if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication), *within twenty-one days* after the advertisement of the bankruptcy in the London Gazette, or (if he were in any other part of Europe at the date of the adjudication), within three months after such advertisement, or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, *have commenced an action, suit, or other proceeding* to dispute or annul the fiat or the petition for adjudication, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be *conclusive evidence* in all cases *as against such bankrupt*; and in all actions at law, or suits in equity brought by the assignees for any debt or demand, for which such bankrupt might have sustained any action or suit, had he not been adjudged bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and issuing forth of such fiat, or before the date and filing of the petition for adjudication; and that such fiat was sued forth, or such petition filed on the day on which the same is stated in the Gazette to bear date."

*Argument.*

Mr. *Daniel* and Mr. *Motteram*, in support of the appeal, contended that the petition of the bankrupt to annul the adjudication was properly addressed to the commissioner, and that it was the proper commencement of a proceeding to annul the adjudication within the scope of the 233rd section of the Bankrupt Law Consolidation Act. That the petition, therefore, was presented to the proper tribunal, and within the time allowed to the bankrupt for that purpose. That the 104th section had only a special object, and a special purpose, — to give the bankrupt the opportunity merely of protecting himself against the advertisement of the adjudication; but that if he did not need that protection, he was at liberty to institute an original proceeding to annul such adjudication before the commissioner; and was not limited to the



time prescribed by the 104th section. That as to the jurisdiction, the whole *primary* jurisdiction in bankruptcy had been by the 12th section transferred from the great seal to the commissioner; and what now remained in the great seal, as dispensed by the vice-chancellor or lords justices sitting in bankruptcy, was an *appellate* jurisdiction only; and that therefore all power to annul a fiat or adjudication in bankruptcy had been completely swept away from the superior court, and was now reposed in the commissioner. They denied that any assent on the part of the bankrupt to the adjudication had been given in evidence, or that it could be implied; that his quitting the custody of the sheriff could not be considered such, as it was an involuntary act on his part, his discharge having been sent by the petitioning creditors, at whose suit he had been in custody. They relied on *Ex parte Thorold* (a), *Ex parte Samuel Bean* (b): they referred to Shelford on the Bankrupt Act, in the note to the 233rd section, page 318., and *Re Cheetham*. (c)

Mr *Swanston* and Mr. *W. W. Cooper* for the respondents. They contended that there still remained sufficient jurisdiction in the great seal to entertain the question of the annulment of an adjudication; but that the application for that object must be made in the cases provided for by the 12th section of the statute. As to this point they referred to the former acts of 1 & 2 Will. 4. c. 56. and 5 & 6 Vict. c. 122. s. 23., and compared them with the corresponding sections in the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. This, however, they considered a minor subject of investigation, as in the present case the petition to annul the adjudication was not a 'proceeding' contemplated by the 233rd section, but was in fact an appeal from the decision of the commissioner, and which as such he was not competent to entertain. They admitted that the bankrupt had full right to have the validity of the adjudication inquired into, but that for that purpose his remedy was limited to the mode pointed out by the 104th section of the statute; that he was not to have the option of choosing the tribunal before which such inquiry should be made; and that he could not compel the commissioner by any proceeding to investigate for a third time the very same question which, 1stly, in an *ex parte* statement on the part of the petitioning creditor, and 2ndly, by an application to stay the advertisement of the adjudication, he (the commissioner) had already disposed of.

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(a) 3 M. D. & De G. 274—285.;  
S. C. 1 Phil. 239.

(b) 1 De G. M. & G. 486.  
(c) 21 L. J. R. Bky. 5.

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If a bankrupt could do so, all the enactments which required certain things to be done within certain specified times, would be abrogated. They relied upon the distinction in *Ex parte Bean* (a), as being that of an application by a creditor, who as such came in without any previous knowledge of or being a party to the prior proceedings, and relied on *Ex parte Thorold* (b) as being a decision in their favour.

Mr. *Daniel*, in reply, said the simple question was, Whether the commissioner, upon the subject of an adjudication, had not, from the beginning and throughout, the sole power of deciding whether the adjudication should take place or not, and that on the 19th of March, when the bankrupt presented his petition, the jurisdiction rested clearly with the commissioner.

*Judgment.*

THE LORD CHANCELLOR said he should recommend their lordships to affirm the judgment of the late Lord Chancellor *Truro*. The question for their lordships' decision seemed to him to be sufficiently simple, and there would be no advantage obtained by postponing their judgment. He thought the decision of Lord *Truro* a correct decision. With respect to the question, as to whether the whole or how much of the jurisdiction of the great seal had been transferred by the 12th section of the Bankrupt Law Consolidation Act he need express no opinion, as in his judgment the question was narrowed to the time within which a bankrupt was entitled to show cause against the validity of the commissioner's adjudication. His lordship stated fully the facts of the case, and said that in his opinion the bankrupt should have shown cause either within the seven days or the fourteen days, as provided for by the 104th section. The first investigation before the commissioner being an *ex parte* one in the absence of the bankrupt, the legislature intended to give him an opportunity, before the insertion of the advertisement of the adjudication in the Gazette, of questioning the propriety of such adjudication, and he had seven days or fourteen days allowed him after service of the duplicate of the adjudication upon him for that purpose. This also was an opportunity for the Commissioner to review his decision. If he is satisfied that the adjudication is not to be published, the adjudication is annulled; if otherwise, the advertisement is inserted in the Gazette as a matter of course. The 233rd section provides thus (his lordship here read the section). Now what happened was this: the bankrupt did not appear before the commissioner within the seven days, to get him to

(a) *Ubi supra*.

(b) *Ubi supra*.

review the adjudication; but on the 19th of March, a month after the duplicate of the adjudication had been served upon him, presented his petition to the commissioner to annul the adjudication. Was this a proper proceeding or not? He, the lord chancellor, was clearly of opinion that it was not. The jurisdiction given to the commissioner upon this subject was pointed out by the before-mentioned section. If the bankrupt does not avail himself of the opportunity thereby given him, the commissioner adjudicates as if the bankrupt were before him. The adjudication is to all intents and purposes as if all the parties were before him. The contention is, that this is not an appeal from the commissioner's decision; but to him, the lord chancellor, this appeared a trifling with words. There was no difference, whether it is called an appeal or not. The application is to undo that which has been done. What the 233rd section means is, that when the commissioner has made his adjudication, he is *functus officii* as to that part of his duty. His decision is conclusive and final. Upon the general question he, the lord chancellor, had very little doubt from the beginning of the argument; and it was only out of respect for the opinion of the very learned, intelligent, and experienced judge who was lately his, the lord chancellor's, colleague, that he had any doubt. He thought it would be a dangerous doctrine to say, that the bankrupt should be allowed to escape from the requirements of the legislature, which it would be to hold that he might, after the opportunity afforded him by the statute, come and upset the adjudication. Now, two authorities had been relied on by the counsel for the appellant. One before Lord *Lyndhurst*; *Ex parte Thorold* he, the lord chancellor, thought was a decision directly the other way. It was true that Lord *Lyndhurst* makes use of this expression—"A petition to the Court of Review to annul the fiat is, I think, obviously comprehended within the words 'other proceeding' in the section;" but his decision is, that it was not presented in proper time. As to the other case of *Ex parte Bean*, that was the application of a creditor—a third party. He was necessarily a stranger to the prior proceedings before the commissioner, and he might very properly say, if he were injured by the proceeding, that it was done in his absence, and without his having had an opportunity of appearing before the commissioner. This was totally a different state of circumstances, and it was at the instance of a party who could not have come in under the provisions of the 104th section. On the whole, he, the lord chancellor, was of opinion, that in the present case it had been an attempt of the

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*Judgment.*

bankrupt to open that which had been previously definitively decided by the commissioner by an improper proceeding, as an appeal from such decision. The costs of the respondents must come out of the estate.

Judgment of Lord Chancellor *Truro* affirmed.  
 Solicitors, *Ivimey* ; and *Norris, Allen & Simpson*.



## EXPARTE JOHN WEST THE YOUNGER, IN RE W. WEST AND J. WEST THE YOUNGER.

COURT OF  
 BANKRUPTCY.

Before Mr. COMMISSIONER HOLROYD.

*May 2.*

A petition to annul the adjudication on the ground of the infancy of the bankrupt, will be dismissed, unless presented within the time prescribed by the 233rd sect. of stat. 12 & 13 Vict. c. 106.

*Argument.*

**THIS** was a petition of J. West the younger, and prayed that the adjudication as against him might be annulled on the ground of infancy.

The petition for adjudication was dated March 5. 1853, on which day the bankrupt surrendered. He filed his balance sheet on the 9th of April, and his petition to annul on the 19th of April. The bankrupt would not be twenty-one years of age until the following September.

*Mr. Duncan* for the petitioner.

*Mr. Heather* (solicitor), for the assignees, cited sections 12. and 233. of the Bankrupt Law Consolidation Act. (a)

*Judgment.*

**MR. COMMISSIONER HOLROYD.** The effect of sect. 233. is the same in substance as the sect. 24. of 5 & 6 Vict. c. 22., and limits the time within which a bankrupt can dispute a fiat. The words in the sect. 233. "other proceeding to dispute or annul the fiat," &c. will comprehend a petition for that purpose. The time fixed by this section is twenty-one days: it is imperative as to this. The act of Parliament is conclusive that he was a bankrupt. If I were to annul upon this petition, I

(a) The 12th section relates to the primary and appellate jurisdiction of the Court, and provides that an appeal from a decision or order of the Court must be entered within twenty-one days, or that such order or decision shall be final. Section 233. enacts, "That if any bankrupt shall not (if within the United Kingdom at the date of the adjudication), within twenty-one days after the advertise-

ment in the London Gazette have commenced an action, suit, or other proceeding to dispute or annul the fiat, or petition for adjudication, &c. the Gazette containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and filing of the petition for adjudication.

should render this section of the act inoperative; *Exparte Thorold* (a), *Exparte Veysey*. (b)

The petition must be dismissed. (c)

Solicitors, *H. A. Reed*; and *Heather & Moger*.

(a) 1 Phil. 239.; S. C. 3 M. D. & De G. 385.

(b) 3 M. D. & De G. 420.

(c) In the matter of *Pritchard and Pritchard*, before Mr. Commissioner *Fonblanque*, a petition was presented to annul the adjudication on the ground of infancy, and the case was heard on the merits. No order was made on the petition, it appearing that the son had held himself out to the world as an adult. But the learned Commissioner intimated an opinion that, however other

parties might be concluded, an infant was not bound by the 233rd section. See also *Exparte Carter re Carter*, decided by Lord *Truro* Ch., on appeal from *V. C. Knight Bruce* (1 De G. M. & G. 12.), which decided that, after the lapse of the time mentioned in sect. 233., the commissioner has no jurisdiction to entertain an application to review the adjudication, either under this section nor section 104. Neither of these authorities were noticed in the above case.

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EXPARTE  
JOHN WEST  
THE YOUNGER,  
IN RE W. WEST  
AND J. WEST  
THE YOUNGER.

Judgment.

## RE JAMES SIMONS. (a)

Before MR. COMMISSIONER PHILLIPS.

MR. COOKE, on a former day on behalf of a creditor, obtained a rule calling on the sureties for the insolvent's appearance at a county court to show cause why the recognisance entered into by them should not be estreated, the insolvent not having appeared according to the order for hearing.

Mr. Douse showed cause. The first objection to the application was, that the insolvent had been discharged out of custody by the detaining creditor, and as the rule had not been applied for till after the petition had virtually fallen to the ground by the nullification of the vesting order, it could not now be sustained. In *Grange v. Trickett* (b), and subsequently in *Kernot v. Pittis* (c), it was decided that the discharge of an insolvent under such circumstances re-vested the property, and determined the title of the assignee and the jurisdiction of the Court. Here the insolvent was discharged by his detaining creditor on

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Where an insolvent had been discharged from custody on finding two sufficient sureties, who had entered into a recognisance to the provisional assignee for his appearance according to the order for hearing.

On a rule to show cause why the recognisance should not be estreated, the insolvent not having appeared.—*Held*, that his illness

was a good answer to the rule.

*Seemle*, the Court has no power to enforce such a rule after the insolvent has been discharged out of custody by his detaining creditor; *Grange v. Trickett*, *Kernot v. Pittis*.

(a) This rule had been granted absolute in the first instance, but it was subsequently altered to a rule nisi by consent of counsel. See *ante*, p. 4.

(b) 21 L. J. Q. B. 26., since overruled in Exch. Ch.

(c) 21 L. J. Q. B. 413.

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*Argument.*

the 14th March, and this application was not made till the 15th of the following month; therefore it was clear, when the rule was granted, not only was the insolvency at an end, but the jurisdiction of the Court was entirely gone. Secondly, the application was not made by the proper person. The sureties, according to the terms of the recognisance, acknowledged themselves indebted to the provisional assignee: he was the person to whom the money was payable, and the only person by whom the application could be made; but it was not anywhere alleged that he had applied for the rule, or deputed any person to act on his behalf. The principle was the same as where money was ordered to be paid to a sheriff; there no person could apply for the payment of it but the sheriff, unless authorised by a warrant of attorney; but here there was no warrant of attorney. Thirdly, his affidavits showed that the insolvent did appear, but, in consequence of illness, he was obliged to leave the court, and, acting under medical advice, he had remained away. [Mr. Commissioner *Phillips*. Why did not the insolvent send some one into court to allege that excuse?] The fact was represented to the judge. Upon these grounds, he submitted, the rule must be discharged.

Mr. *Cooke* observed the important point seemed to be the allegation of illness. [Mr. Commissioner *Phillips*. No doubt that is important; but how could I enforce this rule after the decision in *Grange v. Trickett*.] The debt was due on the 9th of March, the day appointed for the hearing, and the assignee might then have applied for the estreat of the recognisance.

*Judgment.*

MR. COMMISSIONER PHILLIPS. The illness of the insolvent is conclusive. (a) It is not the fault of the bail that the insolvent did not appear at the time and place appointed, and it would be a hardship on them if called on to pay for the act of God. The rule must be discharged.

Rule discharged.

Attorneys, *Richards*, and *Walker*.

## EXPARTE FELL, IN RE FELL.

Before MR. COMMISSIONER FANE.

THE petition for adjudication in this case was dated November 11. 1852, and Fell was adjudged bankrupt on the 13th. There was a previous bankruptcy in 1843, in respect of which Fell had not obtained his certificate. He was opposed at the certificate meeting on the 4th February last, on which occasion his certificate was ordered "to be suspended for two years from the date of the petition, without protection, unless he shall be in custody at the suit of one or more of his creditors; in which case he may apply for his discharge and protection after he shall have been in custody three months." The bankrupt was arrested on a *ca. sa.* on the 18th February, by a creditor who had not come in to prove under the bankruptcy, and had been in custody more than three months.

Mr. *Lawrance* (solicitor) now applied for his discharge.

Mr. *Raw* (solicitor) for the detaining creditor, opposed on two grounds. 1st, That the protection of this court was of no avail as against the common law right of a creditor not coming in under the bankruptcy; *Exparte Rufford in re Rufford* and *Exparte Wragge in re Wragge*. (a) 2ndly, That Fell being an uncertificated bankrupt, the proceedings under the present bankruptcy were void. *Exparte Devas in re Kenton* (b) and *Re Dennis*. (c)

MR. COMMISSIONER FANE. As to the first objection, the point was not decided in the case cited. (a) I do not see any material distinction between a commitment and a *ca. sa.* I have always thought that a debtor should not be left to the mercy of his creditors, but that having undergone the punishment awarded by the Court to mark its sense of his conduct as a trader, he is entitled to protection. (d) As to the second objection, later judges have superseded the doctrine, that a bankrupt cannot possibly acquire property, and have decided that after-fiats can be supported upon the doctrine of reputed ownership. I shall discharge the bankrupt, and now renew his protection under sect. 112. of the Bankrupt Law Consolidation Act. (e)

Solicitors, *Lawrance & Plews*; and *Raw & Gurney*.

(a) 2 De G. M. & G. 234.

(b) 1 M. & A. 432.

(c) 1 Fonb. N. R. 207.

(d) 11 & 12 Vict. c. 86. This act was drawn up by the learned Commissioner.

† (e) 12 & 13 Vict. c. 106. s. 112.: "If any bankrupt be not in prison

or custody at the date of the adjudication, he shall be free from arrest or imprisonment by any creditor for such time after finishing his examination until his certificate be allowed, as the Court shall from time to time think fit to appoint."

1853.

COURT OF  
BANKRUPTCY.

May 21.

Where a bankrupt's certificate was suspended for two years without protection, with liberty, after he should have been in custody for three months at the suit of any creditor, to apply for his discharge and for protection, and the bankrupt, pending the two years was taken in execution, and remained in prison for three months at the suit of a creditor, who had not proved under the estate.—*Held*, that the bankrupt was entitled to his discharge and protection under sect. 112. of the Bankrupt Law Consolidation Act, 1849.

1853.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

May 7.

N., who had described himself in his schedule as the lay impropriator of the tithes of the village of Lindfield, being insolvent and in prison, S., by the license of the bishop, undertook the duties of curate, which he continued to perform for nine years. On a claim being made by S. against the estate of N. for remuneration for his services for four years, part of the nine, at the rate of 30*l*. per annum, —*Held*, that as N. was the lay impropriator of the tithes, his estate was liable to S. for the amount claimed.

*Argument.*

## RE JOHN HENRY NAINBY.

Before Mr. Commissioner Phillips.

IN 1840 the insolvent was committed to the Fleet prison at the suit of a creditor for the sum of 146*l*. 3*s*. 10*d*. In 1846 he filed a petition and schedule, and received his discharge in the same year. During the period of his insolvency he was possessed of the tithes of the rectory at Lindfield in Sussex. The assignees being desirous to ascertain the actual amount of the insolvent's liabilities, the case was referred to the registrar of the court for examination, who reported, amongst other matters, "The Reverend Francis Hill Sewell claims 127*l*. 10*s*. for four years and three months' services in the parish church of Lindfield, as curate, at 30*l*. per annum, and which he claims from the insolvent as lay impropriator of the tithes of the rectory of Lindfield. I do not find upon whose nomination Mr. Sewell performed the duties; but I find the insolvent, as owner of the tithes, was bound to pay a curate, and that the accustomed stipend was 30*l*. per annum, and therefore I admit the claim subject to the approval of the Court." A rule nisi was obtained, calling on the insolvent and the several parties named in the report, to show cause why it should not be confirmed.

Mr. *Dowse*, on behalf of the insolvent, showed cause, and objected to the claim of Mr. Sewell; whereupon an order was made confirming the report, with certain exceptions, and "that Mr. Sewell should, on notice being given to him, attend before the examiner and prove his debt, or the claim would be disallowed." Subsequently, a second report was made, in which the registrar found, "I have been attended by Mr. Sewell, who has been examined upon oath, and after hearing all the evidence offered, I find Mr. Sewell is no creditor."

Mr. *Cooke*, on a former day, on behalf of the assignees, obtained a rule, "that the report as altered pursuant to the order of the Court be absolutely confirmed."

Mr. *Dowse*, on behalf of the insolvent, showed cause; and after remarking on other points of the report, contended that the application on behalf of Mr. Sewell was, that he was a hired person, and therefore entitled to wages; but no evidence was given before the registrar of his appointment, and no evidence was offered to the Court; all that had been done was, to produce on a former occasion the case of *Bonsey v. Lee* (a), and



apply that the original report should be confirmed. [Mr. Commissioner *Phillips*. I understood there were some admissions made, and I understood some facts were admitted, which met that case. I understood he did duty, and that the vicarage was endowed.] It was a donative under the Crown, granted in the reign of Elizabeth, and endowed with peculiar privileges: it did not lapse: the grantee had the sole appointment, and the bishop was without jurisdiction, therefore the case cited did not apply. As Mr. Sewell sought to impeach the last report, it was reasonable to expect some evidence in support of that impeachment; but there was no affidavit to contradict or explain anything reported by the registrar, or to show that he had come to a wrong conclusion. Blackstone said (a), "An advowson donative is where the king, or any subject by his license, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron, subject to his visitation only, and not to that of the ordinary, and vested absolutely in the clerk, by the patron's deed of donation, without presentation, institution, or induction." The right, therefore, of appointment here was in the donee; and if any person took upon himself the duties without his appointment, he would be entitled to no remuneration. In *Rennel v. Bishop of Lincoln* (b), the question of appointment was fully considered; and *Littledale J.* said, "As long as the right of institution is in the patron, the complete dominion remained with the patron, and, when the church is vacant, he may take the profits to his own use;" and again, "If the church be void, the freehold is in the patron, though, perhaps, he may be compelled, by ecclesiastical censures, to fill it; but, in the meantime, he may enter upon the glebe, and take the profits of that and the tithes." This view was supported by the case of *Repington, Executor v. The Governors of Tamworth School* (c), and that a donative did not lapse. *Fairchild v. Gaire* (d) was also an authority.

These cases proved that the appointment vested in the insolvent, and did not lapse; therefore Mr. Sewell was bound to show that he had been regularly appointed. The circumstances were these: a Mr. Dunn had been appointed by the insolvent, but in consequence of some disagreement, a suit was instituted in Chancery, which resulted in Mr. Dunn resigning the appointment. Mr. Sewell, who was then a candidate for holy orders, heard that Dunn was about to retire, and obtained an interview with the bishop; but the bishop expressed great

1853.  
RE JOHN  
HENRY  
NAINBY.  
*Argument.*

(a) Vol. ii. p. 22. 2nd ed.

(b) 7 B. & C. 113.

(c) 2 Wils. 150.

(d) Yelv. 61.

1851.  
 RE JOHN  
 HENRY  
 NAINBY.  
*Argument.*

doubts as to the probability of recovering the stipend. Subsequently, Mr. Sewell was ordained, and was licensed by the bishop to perform the duties of curate to the village of Lindfield; but he was well aware that if he expected remuneration, he must look for it to the rents of the pews, and the voluntary contributions of his parishioners. This was in 1839; and although he remained in the village for some years, he never applied to Mr. Nainby for remuneration; and it was therefore fair to conclude that he knew he could not recover from him. [Mr. Commissioner *Phillips*. The insolvent was in prison.] That fact was well known to Mr. Sewell. The insolvent had not appointed, consequently the church was void. The Court was bound to inquire in every case which involved a proof of debt, if the claim set up was such an one as would be recoverable at law. Here the duties were accepted with a full knowledge of surrounding circumstances, which at law would render the claim unsustainable. The right to presentation did not pass to the assignees, the living being a donative. It was therefore submitted, in the absence of proof of the appointment of Mr. Sewell, that he had no right to be admitted a creditor.

Mr. *Field*, on behalf of Mr. Sewell. There is abundant evidence to prove that the insolvent was the lay impropiator, and that Mr. Sewell was entitled to recover for his services. The insolvent had sworn in his schedule that the living was an appropriated living. The bishop had licensed Mr. Sewell, and that license had been acted on for years. The report of the registrar described the insolvent as the lay impropiator, and therefore *Bonsey v. Lee (a)* governed the case.

*Judgment.*

MR. COMMISSIONER PHILLIPS. It appears to me that the evidence in this case is very clear. The facts are these: a quarrel had arisen between Dunn and Nainby, in consequence of which Dunn was excluded. Nainby must have been aware upon his exclusion, that Mr. Sewell came into his place, and performed the duties, performed them for nine years, though now he only makes a claim for four years. A report was made by the registrar, which I considered rather deficient, and I desired another. The registrar did not find who had appointed Mr. Sewell, but I now find it was by the license of the bishop. Nainby must have been aware of this, and also that he was there performing the duties, which he allows him to continue to do for nine years, and yet he does not seem to have exercised the same acknowledgment towards him that he did towards

(a) 1 Vern. 246.

Mr. Dunn; for if he had, he would have remunerated Mr. Sewell for his labours, and it would not be consistent with fairness that Mr. Sewell should take all the labour and yet receive no remuneration. The first report describes the insolvent as lay impropiator, and that is not negatived in the second. Was the registrar right in calling him the lay impropiator? In the schedule Mr. Nainby has described himself as the lay impropiator, and I cannot conceive a stronger piece of evidence than the sworn document before the Court. The law on the subject is clear, and it says, that, under circumstances such as the present, the curate is entitled to recover. See what a state of circumstances may exist if this were not so. Nainby being in prison, he receives the tithes of the vicarage; he never interferes, and for nine years, for aught he cared, the whole population of that village might have gone without any person to perform those duties which the parishioners had a right to receive; no one there to perform the duties of marriages or deaths, or anything else. In this state of circumstances, I hold the lay impropiator is liable to pay the minister. I know the bishop licensed him to perform the duties, and that, acting in conformity with that license, he did perform them for nine years. I am therefore of opinion, that the report must be amended in that part which says Mr. Sewell is not entitled to remuneration.

Rule absolute to confirm the report, and to amend it by admitting the claim of Mr. Sewell for 130*l.* 10*s.*

Attorneys, *Barrow & Clark; Kearns; Chilton, Burton & Johnson.*

1853.  
RE JOHN  
HENRY  
NAINBY.  
*Judgment.*

## EXPARTE THE ASSIGNEES OF BREWSTER AND WEST, IN RE BREWSTER.

Before MR. COMMISSIONER EVANS.

**BREWSTER**, carrying on business as a printer, took West into partnership. By the partnership articles, either party might, upon giving notice of his intention, dissolve; and, in such case, Brewster might continue or retain the business for his sole use and benefit, and purchase West's share at a valuation to be made by arbitration. Early in 1850 differences arose between the partners, and, on the 6th July, they agreed

notwithstanding he had not, in compliance with the terms of an award, paid his share to the retiring partner.

COURT OF  
BANKRUPTCY.  
May 10. & 26.

Partnership property retained after dissolution by the continuing partner B., who afterwards became bankrupt, — *Held*, to be in the use, order, and disposition of B.,

1853.  
 EXPARTE THE  
 ASSIGNEES OF  
 BREWSTER  
 AND WEST, IN  
 RE BREWSTER.  
*Statement.*

to dissolve, as from June 30., and to refer the partnership matters to arbitration. Notice of the dissolution was inserted in the Gazette, and also given by circular to the creditors. The arbitrator made his award September 28., whereby he adjudged the partnership dissolved as from June 30.; that Brewster should have the partnership property, and pay the partnership debts, and pay West's share, which he valued at 62*l.* 17*s.* 10*d.*, within two calendar months after notice given to Brewster of the award. Brewster had notice on the 29th September to pay the money. On November 18., Brewster was adjudged bankrupt on his own petition; and, on the 22nd, a joint fiat issued against the firm, upon which Brewster and West were declared bankrupt. A question then arose as to whether certain monies received by the assignees of Brewster belonged to the joint estate of Brewster and West, or to the separate estate of Brewster only.

*Argument.*

Mr. *Lucas*, for the assignees of Brewster and West, conceded, on the authority of *Exparte Ruffin* (a), *Exparte Fell* (b), and *Exparte Williams* (c), that the joint creditors had no lien on the joint assets for payment of their debts; and also, that partners might agree to dissolve and transfer the partnership property to one only, provided it were done *bonâ fide*: and contended that the award *per se* did not divest the goods and chattels from the partnership, and vest them in Brewster alone; *Hunter v. Rice* (d); neither were the advertisement in the Gazette, and notice to creditors sufficient for this purpose; *Exparte Wheeler* (e) and *Exparte Clarkson*. (f) The contract to dissolve was executory and not executed. Both the bankrupts and their agents, subsequently to the agreement, represented to the joint creditors that the partnership was in course of arbitration, and they would be paid out of the joint assets.

Mr. *Aspland* for the assignees of Brewster. There was a perfect assignment of the partnership property. The time for payment of the money had not arrived when Brewster became bankrupt; *Hunter v. Rice* is not in point. There the question was, whether an award, without attendant circumstances, could pass the property; and it was decided it could not. In this case, the attendant circumstances are, that West demanded the money. *Exparte Clarkson* is a strong authority in favour of the assignees of Brewster: there was a security for the money; the covenant was in full force, upon which an action would lie.

(a) 6 Ves. 119.  
 (b) 10 Ves. 347.  
 (c) 11 Ves. 4.

(d) 15 East. 100.  
 (e) Buck. 26.  
 (f) 4 D. & C. 56.

The doctrine of reputed ownership must apply; *Ex parte Arbouin*. (a)

Mr. Lucas replied.

MR. COMMISSIONER EVANS. The question lies in small compass. The official assignee has received the money according to his balance sheet. I will look into the cases; but my present impression is, it ought not to go to the joint estate.

The COMMISSIONER now delivered his judgment. In this case, the question for my decision is, whether the property that belonged to the partnership is to be considered joint property, or passes to the separate estate?

I cannot distinguish this case from that of *Ex parte Enderby*. (b) I am aware that, in *Ex parte Pemberton* (c), the Court of Review decided, under somewhat similar circumstances, that debts due to a partnership were to be considered as held in trust, and did not pass as being in the use, order, or disposition; the reason being that if a man holds the property of another, it must always be under a trust. The case of *Ex parte Enderby* appears to have met the approval of the Lord Chancellor, and is in my opinion rightly decided; I therefore think, that what had been partnership property passed, as being in the use, order, and disposition of the bankrupt Brewster. Costs of this inquiry to come out of the fund.

Solicitors, *Hubbard*; and *J. H & J. Linklater*.

(a) 1 De G. 359.  
(b) 2 B. & C. 389.

(c) 1 D. 421.

1853.

EX PARTE THE  
ASSIGNEES OF  
BREWSTER  
AND WEST, IN  
RE BREWSTER.  
*Judgment.*

May 26.

## EX PARTE PHELPS, IN RE BOULTON.

Before MR. COMMISSIONER GOULBURN.

THE bankrupt's certificate was suspended for eighteen months from the 14th of April, 1849, which expired in October, 1850. The bankrupt, however, neglected to apply for his certificate until April last. The question was, whether the certificate should bear date as from the 14th of October, 1850, or from the date of the present application.

A creditor, who had not proved, claimed to oppose, which being resisted the case was adjourned, to enable him to come in and prove his debt.

Mr. *Lawrance* (solicitor) now renewed the application under sect. 4. of the Bankrupt Law Consolidation Act, 1849, for the

COURT OF  
BANKRUPTCY.

April 8.  
May 7. & 23.

Where a certificate is suspended, and the bankrupt neglects to apply for it until some time after the period of suspension has expired, it will be dated as from the date of the application, and not from the expiration of the period of suspension.

1853.  
 EXPARTE  
 PHELPS, IN RE  
 BOULTON.  
*Judgment.*

certificate as from October 14. 1850, and cited sect. 199. of that act, which no longer requires the certificate to be confirmed by the Court of Review.

Mr. *Linklater* (solicitor) for the opposing creditor.

MR. COMMISSIONER GOULBURN took time to consider, and having stated he had consulted two of his brother commissioners who concurred with him in thinking the certificate should be dated as from the first day of this application, now gave judgment accordingly, and signed the certificate as from the 8th April last.

Solicitors, *Lawrance & Plews*, and *J. H. & J. Linklater*.

### EXPARTE DE SOUZA, IN RE LACY.

COURT OF  
 BANKRUPTCY.

Before MR. COMMISSIONER GOULBURN.

April 29.  
 May 13. & 21.

Words in a guarantee, "In consideration of &c., I guarantee the payment by A. of any loss which may possibly accrue to you on your share of this transaction,"—*Held*, that the liability of the party giving the guarantee terminated upon the sale of the goods at a profit, so as not to include a loss occasioned by the misappropriation by A. of the proceeds of the sale.

*Statement.*

ONE Lackerstein, who had a large parcel of indigo on hand, which he had purchased some months previously, on the 20th of July, 1850, wrote to Mr. de Souza, then resident at Paris, "if you will draw on your brothers for 2000*l.* at sixty days sight, I will purchase for you 200 chests of indigo by paying 10*l.* per chest deposit, and getting three months prompt; and I will guarantee you from loss if you will divide profits with me, &c. I will get Lacy to back my guarantee of freeing you from any loss." De Souza accordingly forwarded a bill of exchange for 20,000 rupees (2000*l.*) to Lackerstein, with the following letter:—

"Paris, 22nd July, 1850.

"I will enter into your indigo speculation in the manner you propose; that is to say, on our joint account and risk; no commission, but in lieu, one half share for each to the extent of 200 chests, not more, deposit 10*l.* sterling per chest, for which I inclose you the first of my bills of exchange for 20,000 rupees at sixty days sight. You, of course, will pay reasonable interest to me for your share of the deposit, and will also send me Mr. Lacy's letter of guarantee to indemnify me from any loss on the termination of this speculation."

Lackerstein, upon the receipt of this letter, by the agency of Messrs. Ripley & Co., brokers, entered 226 chests out of his own stock, as a parcel purchased upon this contract, jointly for de Souza and himself, for 12,778*l.*, and the same day (July 25.) wrote to de Souza, acknowledging the receipt of the bill of exchange, announcing the purchase of 226 chests, and requesting to know if he (de Souza) would accept the odd twenty-

six chests as part of the contract; he also inclosed a letter of guarantee from Lacy in the following terms:

"21. Great St. Helen's, London.

"In consideration of your having allowed Mr. A. A. Lackerstein half share in a purchase of 200 chests of indigo, the deposit on which is paid by you, I guarantee the payment by him of any loss which may *possibly* accrue on your share of this transaction."

"Anthony de Souza, Paris."

The whole of the indigo was sold by Lackerstein in February, 1851, at a profit of 1143*l.*, but without the concurrence or knowledge of de Souza. On the 10th July following, Lackerstein wrote to de Souza about the then low state of the market, and treating the indigo as not then sold said, "should a parcel like ours be forced on the market at this critical period, it would bring down prices still lower," &c. I (Lackerstein) alone "shall be a loser if the article is forced on the market just now, and *in any and every case you are guaranteed from all risk of loss.*"

In subsequent letters Lackerstein spoke of the indigo as unsold, and also of de Souza's guarantee. On December 5th, 1851, Lacy wrote to de Souza,—"*Respecting your inquiry about the 226 chests of indigo on a joint account with Mr. Lackerstein, I have to inform you that the cost of them amounted to 12,778*l.*, and the sum paid by you went towards the deposit of 10*l.* per chest: since the turn of the market, he (Lackerstein) has had to pay further margins to brokers, who had advanced money on the indigo. It has, indeed, been an unfortunate spec. I shall see you duly protected.*" Lackerstein became bankrupt in March, 1852, and Lacy in April. Lackerstein's estate paid a shilling in the pound. De Souza now sought to prove against Lacy's estate "for 2571*l.* as for money due upon the purchase and sale of 200 chests of indigo purchased on a joint account with A. A. Lackerstein, a bankrupt, and sold by the said A. A. Lackerstein in April, 1851, the payment of which said sum of 2571*l.* was guaranteed by the said G. Lacy before he became bankrupt."

Lacy on his examination denied all knowledge of the sale until after the bankruptcy of Lackerstein.

Mr. *Baddeley* for de Souza. The guarantee is a continuing guarantee, sufficient in form to secure de Souza against all possible loss accruing upon the whole transaction, and not merely upon the deposit, which was but a small part of it; *Woolley v. Jennings (a)*, *Batson v. Spearman (b)*, and *Duncan's case. (c)* The

1853.  
EXPARTE DE  
SOUZA, IN RE  
LACY.  
*Statement.*

*Argument.*

(a) 5 B & C. 165.  
(b) 9 A. & E. 298.

(c) 2 Shaw. & Dunl. 516.

1853.  
 EXPARTE DE  
 SOUZA, IN RE  
 LACY.  
*Argument.*

words may mean a purchase concurrent with or subsequent to the guarantee given. The consideration was good and sufficient to support the guarantee; it was the admission of Lackerstein to a share in the profits: the deposit was the commencement of the transaction. The consideration was complete, and executed only when the guarantee was given. Thus the consideration was future, or at least concurrent; and there is not a single case to overthrow this construction. The contract was for a purchase in the ordinary course of the indigo trade, upon which brokerage was paid. There is no evidence to show from whom or for whom the previous purchase was made: the sale notes do not disclose the name of the seller. Lackerstein's position as to the right to the indigo was changed on the 25th of July, when de Souza's right accrued. Lackerstein's interest did not arise till afterwards. In equity, de Souza must be regarded as the sole purchaser at the time of the purchase, and Lackerstein as his agent. The rule of construction in respect of guarantees is the same as in other contracts, and must be taken most strongly against the party giving it; *Burge on Sureties* (a), *Hargreave v. Smee* (b), *Mason v. Pritchard* (c), *Nicholson v. Paget* (d), *Semple v. Pink*. (e) Lackerstein or Lacy, or both, had the whole control and supervision of the indigo. Lackerstein's letters clearly show the fraud practised on de Souza. Lacy was father-in-law of Lackerstein, and his letter makes him a party. A surety, who assists in misleading, whether intentionally or not, becomes in law a principal; *Burge on Sureties* (f), *Batson v. Spearman* (g), *Melville v. Doidge*. (h) Strictly, perhaps, de Souza's loss accrued when the indigo was sold, but not knowing of the sale he could make no claim. He was thrown off his guard. The language of the guarantee includes all loss that can possibly arise. Lackerstein had been bankrupt before; it is therefore highly improbable de Souza would have entered into the speculation unless he had been fully guaranteed: He was not guilty of laches. The guarantee was the inducement to de Souza to let in Lackerstein to a share, and the loss is a consequence of the transaction founded on the guarantee.

Mr. *Aspland*, for the assignees, objected. 1. The guarantee is bad on the face of it for want of a consideration; *Butcher v. Steuart* (i), as to the construction of the participle. The contract was complete on the 22nd July. It was past on the 25th; no new consideration can be proved; *Hawes v. Armstrong* (k),

- (a) p. 41.
- (b) 6 Bing. 244.
- (c) 12 East. 227.
- (d) 1 C. & M. 48.
- (e) 1 Exch. R. 74

- (f) pp. 54. 57.
- (g) 9 A. & E. 298.
- (h) 6 C. B. Rep. 450.
- (i) 11 M. & W. 857.
- (k) 1 Bing. N. C. 761,



and *Ellis v. Levi*, appended as a note; *Bell v. Welch* (a), *Bushell v. Beavan*. (b) 2. There is no liability under the guarantee. It does not apply to the transaction between de Souza and Lackerstein. The contract was not performed literally; there was a variation in the quantity, 226 chests purchased instead of 200; *Whitcher v. Hall*. (c) This was not a purchase; it was a transfer of indigo purchased some months previously; *Bonser v. Cox*. (d) Lacy was not guilty of fraud: he knew nothing of the indigo trade; de Souza was aware of this. 3. The indigo sold for a profit; the guarantee was for any loss on de Souza's share, that is, on the purchase and sale. Assuming a proof can be made, it must be reduced by the profit allowed to Lackerstein.

1853.  
EXPORTE DE  
SOUZA, IN RE  
LACY.  
Argument.

There is also an uncertainty, which renders the claim not proveable under the bankruptcy, it being for unliquidated damages; *Re Willis* (e), *Price v. Richardson* (f), as to the doctrine in *Wain v. Warlters*. (g)

Mr. *Baddeley* in reply distinguished *Whitcher v. Hall* and *Bonser v. Cox* from the present case. In the former the plaintiff failed in showing he had performed his part of the contract. In the latter a substantial alteration from that for which the surety became bound was made in the contract, so that this case makes most directly in favour of de Souza; *Fell on Sureties* (h), *Nares v. Rowles*. (i) [Mr. Commissioner *Goulburn*. Is it to be understood that de Souza was contemplating a transaction of the kind that took place? There is no evidence on his part to show that Lackerstein purchased from any one else.] If this were a transaction in the usual course of the indigo trade, de Souza must have contemplated it; *Steele v. Hoe* (k), *Bainbridge v. Wade*. (l) As to the variation in the quantity, there was none so far as de Souza was concerned. The twenty-six chests were a separate transaction, in respect of which he would, if consenting thereto, have to provide 10*l.* per chest deposit. Lacy knew that 200 chests were the subject of the transaction between Lackerstein and de Souza. De Souza was entitled to a share in the profits as well as to his deposit; his was a double loss. If his loss was to be 1000*l.* only as objected, then he must lose 1000*l.* on the deposit; but the advance of 2000*l.* was the basis of the transaction. As to the first objection, the form and date alone of

(a) 9 C. B. Rep. 154.

(b) 1 Bing. N. C. 103.

(c) 5 B. & C. 269.; *Philips v. Asling*, 2 Taunt. 206.

(d) 13 L. J. Ch. N. S. 260.

(e) 19 L. J. Exch. N. S. 30.

(f) 15 M. & W. 539.

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(g) 5 East, 10.

(h) Ed. 1820, ch. v. p. 105.

(i) 14 East, 510.

(k) 19 L. J. Q. B. N. S. 89.

(l) 20 L. J. Q. B. N. S.; 16.; 7 Q. B. Rep. 89. S. C.

1853.  
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 EX PARTE DE  
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 LACY.  
 Argument.

the guarantee will not make it bad. It is sufficient to show the goods were supplied at the request of Lacy. In *Haues v. Armstrong* there was no consideration to support the claim: so also in *Ellis v. Levi*, and *Bell v. Welch*; *Boehm v. Campbell* (a), *Pace v. Marsh* (b), *Payne v. Wilson* (c), *Tanner v. Moore* (d), *Haigh v. Brooks* (e), *Goldshede v. Swan* (f), in which the words "this day" occurred in the instrument. Parol evidence is admissible to explain the guarantee; *Butcher v. Steuart*. It was not necessary for de Souza to take any step in the matter; *Chitty on Contracts*. (g) The cases of the *Trent Navigation Company v. Nares*, and *Brown v. Carr*, there cited, show that the neglect of the principal in lying by does not exonerate the surety. De Souza did not lie by; he was misled by both Lackerstein and Lacy; *Fell on Sureties*. (h) According to the rule laid down in *Wright v. Simpson* (i) de Souza could not prejudice his right by lying by.

Mr. Aspland conceded the objection that the loss was in respect of a sum not ascertained.

Judgment.

MR. COMMISSIONER GOULBURN having taken time to consider, now delivered his judgment. This case has been argued at great length on the part of Mr. de Souza, who seeks to put a proof upon the proceedings for 2571L, in respect of which he was admitted to enter a claim subject to his right to turn it into a proof. It was contended for the assignees, that no consideration appeared on the face of the guarantee—no continuing consideration; that it referred to a past event and was bygone; and it was insisted that, in accordance with the well known rules respecting parol promises, the consideration must appear on the face of the document itself. On the other hand it was contended, that there was a continuing consideration. It is not necessary for me to give an opinion on this point, as I shall decide the question upon other grounds. But if I were required to do so, I should say the consideration was bygone; and the language of the document itself, and the letters that passed between the parties, confirm me in this opinion. The next objection was, that this was not a real purchase. Lacy said in his examination, though much pressed, "I know of no purchase." Doubtless de Souza has been very ill-treated by the loss of his money through the fraud of Lackerstein: but the

(a) 8 Taunt. 679.

(b) 1 Bing. 216.

(c) 7 B. & C. 423.

(d) 15 L. J. Q. B. N. S. 391.

(e) 10 A. & E. 309.

(f) 1 Exch. Rep. 154.

(g) Ed. 3. p. 532. and cases cited.

(h) p. 185.

(i) 6 Ves. 734.

question is, Whether this is to be recovered out of Lacy's estate? Will any one suppose from Lackerstein's letter of the 20th July, that he was alluding to a large parcel of indigo purchased by him many months previously, and then in his possession? What he described as "*maiden parcels*" had been in his warehouse for several months. If he had so intended, he would have expressed himself very differently: his representations throughout were wholly untrue. Then, as to the payment of brokerage, will this vary the transaction? I think not. I do not think there was such a purchase as the guarantee contemplated. The words in de Souza's letter, "*on the termination of this speculation,*" fix the period at which all liability on the guarantee is to cease; *i. e.* when the goods are sold by Ripley. I cannot think it was intended to end at some subsequent period, *e. g.* when Lackerstein went away. The next point is, Can this be called a loss on de Souza's share in the transaction? Can the word "*possibly*" in the guarantee take in such a loss as has happened? I have no doubt that what was intended to be guaranteed against terminated when the indigo was sold: it was sold at a considerable profit, and de Souza was entitled to have called on Lackerstein to pay him his share of the profit. A loss by the fraud of Lackerstein was never contemplated. As to whether this is a proveable debt, is conceded by Mr. *Aspland*: I need not, therefore, go into that. Lord *Eldon's* judgment in *Wright v. Simpson*, in its evident sense, would seem to imply that a surety would not be discharged, however negligent his principal might be. In the case of a surety where default has taken place on the part of the principal, the question is, whether, if the principal has been guilty of fraud or laches, the surety is discharged? Here was laches on the part of de Souza. He made no inquiries until Lackerstein's failure. The sale took place in February: Lacy knew nothing of that; if he had, the loss to de Souza might have been avoided. I cannot but think this comes within the case of principal and surety, and am of opinion there was no loss upon the transaction, but a profit. The claim must be expunged.

Solicitors, *Venning, Naylor & Robins*; and *Reed, Marsden, & Langford*.

1853.

EXPARTS DE  
SOUZA, IN RE  
LACY.

Judgment.

1853.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

May 23.

Where an insolvent comes before the Court upon an application for protection under sect. 28. of 7 & 8 Vict. c. 96., the Court will take into consideration all the circumstances of the insolvency, the conduct of the petitioner, as well before as after the insolvency, and adjudicate accordingly.

Judgment.

## RE WILLIAM MILLER.

Before MR. COMMISSIONER PHILLIPS.

**THIS** insolvent, a baker, had been before the Court on a former occasion, when the case was adjourned *sine die*. He now applied for protection under the 28th sect. of the act of the 7 & 8 Vict. c. 76.

Mr. *Dowse*, on behalf of a creditor, proposed to enter into an examination respecting an alleged fraudulent disposition of the insolvent's business.

Mr. *Cooke* objected, and contended that the proper time for such an inquiry was when the insolvent was before the Court on his first examination.

MR. COMMISSIONER PHILLIPS said he was called on to consider within what period the insolvent was entitled to an order for protection, and the Court could only be guided in its decision by the act of Parliament. The words of the 28th sect. were, "The Commissioner shall have the power, after the expiration of such time subsequent to the filing of the petition, as, having regard to all the circumstances of the insolvency, and the conduct of the petitioner as an insolvent debtor, before and after his insolvency, the Commissioner shall think just, and after hearing the petitioner or any of his creditors;" he was, therefore, to hear any creditor, and to take into consideration *all* the circumstances of the insolvency and the conduct of the petitioner before and after his insolvency; and it was then, and then alone, that he was given the power of pronouncing an adjudication. On the best consideration which he could give the subject, he could see no other conclusion to which he could arrive. The creditor, therefore, had a right to enter into the proposed examination.

Attorneys, *Furner* ; — *Hodgson*.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

April 30.

Where an application is made to this Court to appoint an assignee in a case which has been heard in a county court, it must be accompanied by a certificate from the judge that no similar application has been made to him by the person nominated, and been refused.

## RE JOSEPH DAVIS.

Before MR. COMMISSIONER PHILLIPS.

**THE** insolvent had petitioned the County Court of Gloucestershire, holden at Bristol, and had received his discharge.

Mr. *Nicholls* now moved, on a nomination of creditors, for the appointment of Augustus Phillips, wine and spirit merchant, as assignee to the estate. The application was supported by the ordinary affidavits.

1853.  
RE JOSEPH  
DAVIS.

MR. COMMISSIONER PHILLIPS. It is expedient to lay down some rule with reference to cases of this description. At present the Court is open to all kinds of fraud. The person applying for the appointment here may have been refused in the County Court. He must get a certificate from the judge that no similar application has been made in the County Court and refused; and in future the Court will expect in every application of this kind, that beyond the ordinary affidavits there be a certificate of the kind I have mentioned.

*Judgment.*

On a subsequent day the required certificate was handed in, and the Court

Granted the motion.

Attorneys, *Surr* and *Gribble*.

## RE WILLIAM CALT.

Before MR. COMMISSIONER PHILLIPS.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

May 28.

THE insolvent, a farmer and licensed victualler, had petitioned the Court under the 1 & 2 Vict. c. 110.: during his examination it was elicited that the arrest was friendly and for the purpose of petitioning the Court; but there were no assets from which the creditors might receive a dividend.

Where an insolvent comes before the Court on a friendly arrest, and there are no assets to be divided amongst creditors, the petition will be dismissed.

Mr. *Dowse*, on behalf of a creditor, submitted that the petition must be dismissed: the insolvent had come before the Court for his own convenience, but his schedule disclosed no benefit to creditors.

Mr. *Sargood* supported.

MR. COMMISSIONER PHILLIPS. When an insolvent asks for his discharge under such circumstances as the present, the Court expects that some equivalent should be offered to creditors. Here it is admitted that the arrest is friendly, and that there are no assets to be divided amongst creditors. The petition must be dismissed. (a)

*Judgment.*

Petition dismissed.

Attorneys, *Nicholls & Clark*; and *Scarman*.

(a) Sed vide *Re William Jones*, 1 Bank. & Insolv. Rep. 3.

1853.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

May 23.

Where an insolvent had disposed of his business shortly before petitioning the Court, but omitted to erase his name from the premises, and the business was carried on as usual by the purchaser, — *Held*, that the description as "lately of that place" was sufficient.

*Argument.*

THE insolvent a confectioner, had petitioned the Court under the protection statutes. It appeared that in April he had assigned his furniture to a person named Hicks, in consideration of a sum of money, which had since been expended in the support of himself and family. Since that period, the business had been relinquished to Hicks, who still continued to carry it on for his own benefit, but the name of the insolvent was still on the window, painted in large brown letters.

Mr. *Carteen*, on behalf of a creditor, objected that the insolvent had not properly described himself. By allowing his name to continue on the window of the shop he held himself out to the world as now of that place, and he was bound to describe himself accordingly.

Mr. *Sargood* for the insolvent. The great object of the description is to enable the creditors of an insolvent to identify him as the person to whom they have given credit. It cannot be contended that any person has been misled, because the insolvent has described himself as "lately" of this very place; besides, if he describes himself as "now" of that shop, the description will be untrue, inasmuch as his evidence contradicts the facts.

*Judgment.*

MR. COMMISSIONER PHILLIPS. I think the objection is answered by the description which is given. The insolvent has described himself as "lately" of this place, and I don't think any creditor can be misled. If the place or trade had been omitted, no doubt the objection would be fatal; but the place has been abandoned, not only as a place of residence but as a place of business, and I therefore think the description sufficient.

Objection disallowed.

Attorneys, *J. E. Lea*; and *Hodson*.

## RE WILLIAM PATTERSON.

Before MR. COMMISSIONER PHILLIPS.

1853.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

May 28.

**T**HIS insolvent applied for his discharge under 1 & 2 Vict. c. 110. It appeared on examination, that, up to the period of his imprisonment he had carried on the business of a travelling draper, or tallyman, in and about the neighbourhood of Croydon, and the surrounding districts. During each year it was his custom to make certain "rounds," for the purpose of disposing of his goods, and of collecting outstanding debts. An assignee had been appointed, to whom a sum of 85*l*. had been offered for the sale of the "round."

Where an insolvent carries on a business which is capable of being sold, the Court will withhold the discharge until he has placed the assignee in a position to dispose of it for the benefit of creditors.

Mr. *Cooke*, on behalf of the creditors, applied that this property might be given up to the assignee for the benefit of creditors, and cited *Re William Jones (a)*, and *Re Robert Meek (b)*

MR. COMMISSIONER PHILLIPS said the Court would require the insolvent to enter into a rule to assist the assignee in disposing of the business. From the offer which had been made, it was clear the "round" was of some value; but whatever it would realise, the creditors were entitled to receive. When the insolvent had signed a proper undertaking he would be discharged.

Judgment.

Discharged forthwith on executing the following undertaking:—

"In the Court for Relief of Insolvent Debtors, in the matter of William Patterson, sued as William Patterson, formerly of Croydon, then of No. 60. Waterloo Road, and late of Wandsworth, all in the county of Surrey, travelling draper.

"Whereas it appears to this Court that the above-named insolvent debtor is possessed of a certain interest in supplying purchasers in and upon a certain district within the county of Surrey, familiarly known by the name of a 'round, or walk,' and for which the assignee, William Hyslop, has been offered the sum of 85*l*. by one Ninian Williamson, of Croydon, and to whom the said 'round or walk,' together with the debts thereon now due to the said assignee of the insolvent are to be sold; and whereas the Court has required the said insolvent to show up the said 'round,' and to point out the debtors thereon to the

(a) *Cooke's Insol. Prac.* 238.(b) *Ibid.* 239.

1853.

RE WILLIAM  
PATTERSON.

said assignee, or the said Ninian Williamson, or any other person to be appointed by them. Now I, the above-named William Patterson do hereby undertake, promise, and agree to show up the said 'round,' and point out the debtors or customers thereon to the said assignee or Ninian Williamson, the proposed purchaser, or any other person who shall be appointed by them or either of them: and I also undertake, promise, and agree, never by myself, or by any other person for or on my behalf, to solicit the debtors or customers of or upon the said 'round' to purchase any goods or merchandise from me or any other person, nor to interfere in any manner with the said debtors or customers, or any of them, so as to prevent them from dealing with or purchasing goods or merchandise from the said Ninian Williamson, or any person appointed by him, or to whom he shall assign or transfer the same business: and in the event of my committing any breach in the above promise or undertaking, I consent and agree that it shall be competent for this honourable Court to revoke my discharge, which is now granted to me on the condition of my faithfully performing the promise, undertaking, or agreement to which I now bind myself; and I further consent and agree that this shall be made a rule of this Court." (a)

"Dated the 28th day of May, 1853.

(Signed) "WILLIAM PATTERSON."

"Witness (signed) H. BATES."

Attorneys, *Blake & Poole ; Plumley.*

(c) Sect. 66. 1 & 2 Vict. c. 110. empowers the Court to commit for disobedience to any rule or order "made or entered into by the consent

*of such assignee or other person, for carrying into effect the purposes and provisions of this Act."*

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

June 7.

In estimating the amount of a trader's debts, those due to mortgage creditors must be included.

RE JOHN GEORGE HARMER.

Before MR. COMMISSIONER LAW.

THE insolvent, a house-smith and ironmonger, had petitioned the Court, under the protection statutes, as a trader, "but owing debts amounting in the whole to less than 300*l*."

The aggregate debts set out in the schedule amounted to 98*l*. 1*s*. 7*d*.; but it appeared that in January, 1849, a lease had been granted to the insolvent of a house and surrounding land for a term of ninety-seven years, subject to a ground-rent of 6*l*. annually. In August, 1849, the insolvent had mortgaged the property for 200*l*.; and in January, 1851, a further mort-



gage was executed to secure an additional 100*l*. Two months before filing his petition, the insolvent had assigned to his brother-in-law the equity of redemption to the house and land in consideration of a sum of 109*l*. 14*s*.

1853.

RE JOHN  
GEORGE  
HARMER.

MR. COMMISSIONER LAW. The mortgagee has executed no release to the insolvent; therefore he still owes the 300*l*. borrowed in 1849 and 1851. The debts take the case out of the jurisdiction of the Court. The petition is dismissed.

*Judgment.*

Petition dismissed.

Attorney, *Furner*.

### RE JOHN TAME.

Before THE CHIEF COMMISSIONER.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

June 1.

THIS insolvent had filed a petition on the 27th April. Up to that period he had carried on the business of a beer retailer in New Street, having a seven years' lease of the premises, of which five were unexpired. In March he had assigned the lease to a brewer, in consideration of a debt of 36*l*., owing to him for beer, and of his discharging a debt of 12*l*. 15*s*. due to the landlord of the premises for rent.

An insolvent who parts with property within three months of filing his petition, otherwise than for the necessary support of himself and family, and the necessary expenses of his petition, or in the ordinary course of trade, has no *locus standi* under the protection statutes.

Mr. *Reed*, on behalf of a creditor, called the attention of the Court to the allegation of the petition, "That your petitioner has not parted with or charged any of his property (except for the necessary support of himself and family, and the necessary expenses (not exceeding —) of this his petition, or in the ordinary course of trade) at any time within three months of the date of filing this his petition:" the allegation was for the information of the Court and the creditors; and the insolvent had pledged his oath to the truth of the statements in the document on which it was set out. That the allegation was untrue there could be no doubt, since the date of the assignment showed that the lease was parted with in March.

*Statement.*

THE CHIEF COMMISSIONER. The allegation in the petition, which is sworn to, that the insolvent has not parted with property within three months, is untrue, and I shall dismiss the petition.

*Judgment.*

Petition dismissed.

Attorney, *Hicks*.

1853.

## EXPARTE SPRIGGS, IN RE ASHTON AND SPRIGGS.

COURT OF  
BANKRUPTCY.

Before MR. COMMISSIONER HOLROYD.

June 4.

A trader, who by absconding, had committed an act of bankruptcy, upon which he was adjudged bankrupt, several days prior to the adjudication sailed for Australia; but being pursued, was brought back, and committed to Newgate for not surrendering under sect. 251. of the Bankrupt Law Consolidation Act, 1849.—*Held*, that, pending the criminal proceedings, this Court would not interfere by allowing him now to surrender, the time for so doing having expired.

*Argument.*

THE bankrupts, in consequence of disputes, agreed to dissolve partnership in three months, which would expire in December, 1852. On the 4th September, without any intimation to his partner, or any member of his family, the bankrupt Spriggs sailed in the "Cleopatra" for Australia, taking with him partnership assets to a considerable amount. On the 14th September, a joint petition was presented to this Court, upon which the firm was adjudged bankrupt. An officer went in pursuit of Spriggs, and reaching Melbourne before the "Cleopatra," arrested the bankrupt on his arrival, brought him back to England, and lodged him in Newgate. Pending the investigation before the magistrate for having committed an offence against the bankrupt law (a), the bankrupt petitioned for leave to surrender and conform, on the ground that he had no notice of the bankruptcy.

Mr. Sturgeon, in support, cited *Exparte Higginson* (b), *Exparte Shiles* (c), and *Exparte Baker*. (d) The policy of the bankrupt law is not to entrap bankrupts into the commission of offences. The fact of the absconding is not a felony within the act. The Court has generally required it should be satisfied that no fraud was contemplated; but this case rests upon a different ground, viz. that the bankrupt had no opportunity of surrendering. In *Exparte Nairne* (e) the bankrupt went to Boulogne, which place was easy of access: that case, therefore, cannot govern the one now before the Court.

Mr. Prentice, contra, was not called on.

*Judgment.*

MR. COMMISSIONER HOLROYD. I am of opinion this Court ought not to interfere, pending the criminal proceedings against the bankrupt. If there had been any case in which, fraud having been committed, the bankrupt had been allowed to surrender after the time, it might be different; but there is no such case. The partnership was to be dissolved in three months; the bankrupt went away before the time without communicating with any one. Whether in so doing he had a criminal intention or not, is not for me to decide; I must leave that to the tribunal

(a) 12 &amp; 13 Viet. c. 106. s. 251.

(b) 12 Ves. 496.

(c) 2 Rose, 381.

(d) 2 Gl. &amp; J. 337., and the cases there collected.

(e) 1 Fonbl. 37.

before which the matter is now pending. The petition must be dismissed.

Solicitors; *Moss; Sole, Turner & Turner*

1853.

EXPARTE  
SPRIGGS, IN RE  
ASHTON AND  
SPRIGGS.

## EXPARTE ALLEN, IN RE COLUMBINE.

Before MR. COMMISSIONER GOULBURN.

COURT OF  
BANKRUPTCY.

May 30.

June 4.

AN order in this bankruptcy had been made for Allen, a mortgagee, to produce at his examination in this Court (*inter alia*) all briefs and papers in a certain action of *Allen v. Capel*. This was resisted on the ground of privilege. The bankrupt, who was an attorney, was not the attorney of Allen in this action, nor had he been in any way concerned in preparing the briefs.

Briefs, which have been used at a trial, and returned to the client, are privileged as to the matters therein.

*Statement.*

Mr. *Lucas* appeared for Allen.

MR. COMMISSIONER GOULBURN now gave judgment. The question in this case is reduced to the production of two briefs, which, at the request of the witness Allen, and on his behalf, had been delivered to his counsel to be used in a certain trial, and which he now insists that he is privileged from producing. It was admitted that they might contain information bearing on the subject of the witness' examination in this Court. The origin of this principle, as stated by Lord *Brougham* in *Greenough v. Gaskell* (a), appears applicable to the present case. In *Lord Walsingham v. Goodricke* (b), the late Vice-chancellor Sir *J. Wigram*, who was himself the author of a learned work on this doctrine (c), explained the history of the law of privilege. The fourth point in his statement, and which is most material to the question before me, is, "whether the defendant is entitled to protect from discovery, in the suit of one party, cases or statements of facts made on his behalf by or for his solicitor or legal adviser, in the subject-matter in "question after litigation commenced, or in contemplation of litigation on the same subject with other persons, with the view of asserting the same right?" (d) That was the point raised in *Coombe v. Corporation of London* (e), and was decided in the affirmative. The case of *Radcliffe v. Fursman* (f) has frequently been mentioned with

*Judgment.*

(a) 1 M. & K. 98.

(b) 3 Hare, 122.

(c) *Wigram on Discovery*.

(d) See all the points discussed,

and the cases collected in 1 Dan. Ch. Pr. 517.

(e) 1 Y. & C. 631.

(f) 2 Bro. P. C. 514.

1853.

EXPARTE  
ALLEN, IN RE  
COLUMBINE.  
*Judgment.*

disapprobation, and I do not think I ought to follow it here. I have no doubt in my own mind, nor (I may add) has one of my brother commissioners, with whom I have conferred upon this point, any doubt but that we ought to hold the privilege inviolable.

Solicitors, *Cordwell ; Chidley.*

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

June 10.

Sect. 6. of 10 & 11 Vict. c. 102. gives to the Court for Relief of Insolvent Debtors jurisdiction in all cases in which the insolvent shall have resided for six calendar months next immediately preceding the time of filing his petition, within any parish, the distance whereof, as measured by the nearest highway from the General Post Office in London to the parish church of such parish, shall not exceed the distance of twenty miles.

W., a butler to a gentleman who had establishments both within and without the jurisdiction, had resided at each during the six months.—*Held*, insufficient to constitute a residence under the provisions of the act, and the petition was dismissed. (a)

## RE JOHN WHITTINGHAM.

Before THE CHIEF COMMISSIONER.

THIS insolvent, who had described himself as a butler in a family, had filed a petition for protection on the 18th May.

Mr. *Dowse* supported.

A creditor in person opposed, and objected that the insolvent had not resided, according to the statement in his petition, within the jurisdiction of the Court for six calendar months. It appeared on examination, that the insolvent was in the service of a gentleman who had establishments both within and without the jurisdiction of the Court, that in the county of Norfolk being occupied at intervals during the year, and that in London for the remaining period. In October, 1852, the insolvent had accompanied his master from the residence in London to the establishment in Norfolk, where he remained until March in the following year, when he returned with the family to London, where he continued to reside up to the period of filing his petition. During the insolvent's absence in the country, his wife was living in London, but she was in a different service, and the insolvent had no personal residence.

THE CHIEF COMMISSIONER said, there was no residence for six calendar months within the jurisdiction of the Court sufficient to satisfy the provisions of the act, and the petition must be dismissed.

Petition dismissed. (b)

Attorney, *E. G. Bradley.*

(a) The question of residence was largely considered in *Reg. v. The Inhabitants of Stapleton*, 1 Com. L. Rep. 84., where it was held, "a man who leaves the parish in which his family reside for a temporary purpose, intending to return, does not interrupt his residence so as to be removable thence; but the remain-

ing in another parish under a contract for service, indefinite as to time, is a permanent purpose, and does interrupt the former residence."

(b) 7 & 8 Vict. c. 96. s. 2. enacts, "That every petition for protection from process presented, &c. shall be in the form specified in the schedule

1853.

EXPARTE THE ASSIGNEES OF FERRIS, IN RE  
MORTON.

Before MR. COMMISSIONER GOULBURN.

COURT OF  
BANKRUPTCY.

June 3. &amp; 14.

ON May 20. the day appointed for the certificate meeting in this matter, it was adjourned for further consideration to the 3rd of June. A creditor, who had proved his debt, did not give notice of his intention to oppose until the 30th of May. The question was, whether, not having given proper notice previous to the adjournment, he could be heard.

Certificate meeting adjourned for further consideration to a day certain,—  
*Held*, that a creditor who had proved his debt might, upon good cause shown, be let in to oppose at the adjourned meeting, notwithstanding he had not given the requisite notice of opposition until after the adjournment.

It was contended for the bankrupt, that the adjournment was merely a continuation of the former sitting for judgment only, and not an adjournment *sine die*; and *Exparte Woods* (a) was cited.

Mr. *Stevenson* (solicitor), *contra*, stated he had no notice of the 20th May having been appointed for the certificate meeting, and that, having given notice, he was entitled to oppose at the adjourned meeting.

MR. COMMISSIONER GOULBURN. I think this case infinitely stronger than *Exparte Woods*. That case was carried to the Vice-Chancellor *Knight Bruce*, and from him to the Lord Chancellor (*Truro*), both of whom confirmed the decision of the Court below, and dismissed the appeal. It is therefore entitled to great consideration as to the course to be pursued in the case before me. Notice of intention to oppose was given; but the

hereunto annexed; and if such petition, &c. shall not be in the form herein prescribed, such petition shall be dismissed." 10 & 11 Vict. c. 102. transfers the jurisdiction to this court and the county courts; and sect. 16. empowers an alteration in the forms hitherto used, so far as to adapt them to the change of jurisdiction. Under this section the form of petition given in the schedule to 7 & 8 Vict. c. 96. is slightly varied, one of the allegations now being, "that your petitioner has resided six calendar months within the district of this honourable court." Sect 8. provides, "That if any such insolvent shall not have so resided for six months in any one place as afore-

said, then he shall file his petition in the said Insolvent Debtors' Court, and the jurisdiction aforesaid in the matter of such insolvency shall be vested either in the Court for Relief of Insolvent Debtors in London, or in such one of the said County Courts as the Court for Relief of Insolvent Debtors shall direct." The insolvent should have prepared his petition according to the form given to meet the provisions of this section, which avoids the allegation of a six months' residence, and states "that your petitioner has not resided for six calendar months, &c. within the jurisdiction of this honourable court."

(a) 1 Fonbl. 230., 20 L. J. B. 619.

1853.

EXPARTE THE  
ASSIGNEES OF  
FERRIS IN RE  
MORTON.  
*Judgment.*

question is not one of opposition, but whether Mr. *Stevenson* has any *locus standi*? The matter of the certificate was not discussed at the former sitting; it was *exparte* only, and the adjournment was for further consideration. Under these circumstances I shall allow Mr. *Stevenson* to make an affidavit as to the reason of his not giving notice before: and, if this be satisfactory, will follow the course adopted in *Exparte Woods*, and appoint a day for the certificate. A memorandum must be drawn up similar to that in *Wood's case*, stating that the omission of notice was purely accidental.

Solicitors, *Stevenson* ; *A. A. Reed*.

## EXPARTE ———.

COURT OF  
BANKRUPTCY.

June 11.

*Semble*, this Court has no power to dismiss a petition for arrangement, except in the cases indicated in sect. 223. of the Bankrupt Law Consolidation Act, 1849.

Before MR. COMMISSIONER GOULBURN.

A TRADER, who had petitioned under the arrangement clauses of the 12 & 13 Vict. c. 106., and had conformed and paid a dividend, applied by petition, praying that the petition for arrangement might be taken off the file, or be dismissed or annulled, or that all further proceedings thereon might be stayed.

Mr. *Lawrance* (solicitor), in support, relied on the practice in bankruptcy to annul with consent of creditors, and also in insolvency to take a petition off the file, when it appeared that all the creditors had been satisfied.

*Judgment.*

MR. COMMISSIONER GOULBURN said, that as this seemed to be the first application of the kind, he should make no order; but it did not appear to him that he could dismiss the petition except in the cases indicated in sect. 223. of the act. (a)

(a) The cases mentioned in s. 223. for dismissing the petition are,—if the petitioning trader shall not duly attend the sittings of the Court; or if he do not file his account as required by sect. 214.; or shall fail to obey any order of the Court; or the proposal of the petitioner, or some modification thereof be not assented to; or he shall have contracted debts by fraud, breach of trust, or without reasonable probability of being able to pay; or by reason of any judg-

ment in certain actions specified; or if his affidavit filed with his petition be wilfully untrue; or if he do not make a full disclosure; or his proposed arrangement be not made *bonâ fide*, or be not reasonable and proper; or if he have postponed the presentation of his petition; or assigned, transferred, or made away with any of his estate or effects; or wilfully been a party to his goods being taken in execution.

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## EXPARTE ALLUM, IN RE KERSLAKE.

Before MR. COMMISSIONER EVANS.

COURT OF  
BANKRUPTCY.

June 7 &amp; 14.

THIS was an application to have the proceeds of a sale of the mortgaged premises, which had been sold under an arrangement with the assignees, paid over to the mortgagee. The general facts will be gathered from the judgment.

Mr. Bagley, for Allum, cited *Hunt v. Mortimer* (a), *Hutton v. Cruikwell* (b); *Kettleby v. Attwood* (c); *Orlebar v. Fletcher* (d); and *Buckmaster v. Harrop*. (e)

Mr. Keene, *contra*, cited Statute of Frauds, *Graham v. Chapman* (f), and *Hall v. Wallace*. (g)

A mortgagee is entitled, as against the assignees of a bankrupt, to the proceeds of a sale of mortgaged premises, into the possession of which he has entered several days prior to the bankruptcy.

Judgment.

MR. COMMISSIONER EVANS. It appears by the affidavit of Allum that he advanced to the bankrupt in June and July, 1852, the sum of 150*l.*, on a promise by the bankrupt to give him a mortgage of saw-mills, which the bankrupt was about to erect; that the bankrupt asked Allum to make him a further advance on the same security; that Allum accordingly advanced a further sum, amounting in the whole to 245*l.*, and also another sum of 70*l.*; that the lease being perfected was delivered to Allum's attorney by the attorneys of the lessors; that the bankrupt refusing to execute the mortgage, Allum sued him, and stayed proceedings on the mortgage being executed, which took place on the 3rd January, 1853. By the mortgage-deed the debt was payable by instalments. The bankrupt neglected to pay the first instalment, whereupon Allum entered into possession on the 4th February.

To invalidate this mortgage it is contended that there was no agreement by the bankrupt to mortgage at the time of lending the first sum of money. The only evidence of the mortgagor on this point is that of the bankrupt's wife, and that is principally argumentative; but it is most improbable that any one would have lent the bankrupt money upon any other terms, particularly knowing his previous circumstances.

It was next contended that such promise being only verbal, it could give no legal or equitable right to the mortgage: undoubtedly that would have been so, if the mortgage had not been completed; but that being done, the previous promise is strong evidence of the *bona fides* of the transaction.

(a) 10 B. &amp; C. 44.

(b) 1 E. &amp; B. 15.

(c) 1 Vern. 471.

(d) 1 P. W. 737.

(e) 13 Ves. 472.

(f) 21 L. J. 173. C. P.; and see *Cannon v. Smith*, 1 Com. L. Rep. 179.

(g) 7 M. &amp; W. 353.

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 {  
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 Judgment.

The next objection is, that the mortgage was a conveyance of all the bankrupt's property; but it appears to me that upon this there is no evidence. It has never been explained why the bankrupt does not appear; he may have taken with him a large sum of money. There is no evidence that debts to a considerable amount are not due to him. I am therefore of opinion, on the authority of *Hutton v. Cruttwell* (a), *Young v. Ward* (b), *Wedge v. Newlyn* (c), and *Chase v. Goble* (d), that the mortgage is a valid transaction, and that the mortgagee is entitled to the proceeds.

Solicitors, *Kemp & Hare*.

(a) 1 E. & B. 15.  
 (b) 8 Exch. R. 221.

(c) 4 B. & A. 831.  
 (d) 2 M. & G. 930.

COURT OF  
 BANKRUPTCY.

LORDS  
 JUSTICES.

April 29.  
 May 6.

A trader, on the 20th December, 1851, assigned to some of his creditors all his debts, bills of exchange, promissory notes, and other securities, and all books of account in which such debts or sums were entered, as a security for their debt; and at the same time, although not personally known by the trader, writes on two judgments, obtained some time previously, were in the hands of the sheriff, who on the 22nd

### EXPARTE BAILEY, IN RE BARRELL.

THIS was a petition by the trustees of the Barstable and Chafford Benefit Building Society, claiming the benefit of a deed of assignment executed by the bankrupt, and dated the 20th December, 1851. The bankrupt was a grocer at Billericay, and had been appointed the treasurer of the building society, in which office he continued from the 2nd March, 1847, to the 20th December, 1851. It then appearing that the bankrupt was indebted to the petitioners in the sum of 777*l.* 14*s.* 9*d.*, monies received by him on their account, payment was required; and it was intimated that proceedings would be taken to enforce payment. Under these circumstances, in the evening of the 20th of December, 1851, the bankrupt, after some hesitation, executed the deed in question. By the deed, which was made between the bankrupt, described as treasurer of the building society, of the one part, and the petitioners, described as trustees, of the other part, in consideration of 777*l.* 14*s.* 9*d.* due and owing by the bankrupt as treasurer of the society to the petitioners, he, the bankrupt, conveyed, granted, and assigned to the petitioners, as trustees of the society, all his messuages, land, and hereditaments wheresoever and whatsoever, and all other freehold hereditaments in or upon which he had any legal or

December levied execution on the trader's stock in trade and furniture. On the 24th December the trader was adjudged bankrupt, on a petition presented on the 23rd. — *Held*, that the assignment was void as against the assignees under the bankruptcy.



equitable power of appointment or disposition, to hold the same subject to the mortgages thereon: by the same deed the bankrupt, for the consideration aforesaid, covenanted to surrender, at his own costs, to the use of the petitioners, all the copyhold estate, whatsoever and wheresoever, in which he had the legal estate and interest, or over which he had a power of appointment: he also thereby granted all surplus rents and profits whatsoever, whether in trust or otherwise, to which he might become entitled; and also all legacies, devises, and interests under any will; and also three policies of assurance therein described (one being upon the bankrupt's own life), and all sums thereby assured, and all debts or sums of money whatsoever then due and owing to the bankrupt from any person or persons whomsoever, and all bills of exchange, promissory notes, or other securities for, or evidence of, such debts, and all books of account in which such debts or sums of money were entered; to have, receive, and enjoy the same, subject, as to the policies of assurance, to certain incumbrances thereon: the deed then contained a declaration that the assignment was by way of security for the debt due to the petitioners. It appeared that the mortgages affecting the freehold estates included in the deed were about equal to the value of the estates. The bankrupt's stock in trade and furniture was his only property not included in the deed; and on the morning of Monday, the 22nd of December, this stock in trade and furniture was seized by the sheriff in execution of two writs which had been lodged with him for that purpose, by Mr. Woodward, at three o'clock in the afternoon of the 20th of December. On the 23rd of December a petition for adjudication in bankruptcy was presented, and on the 24th adjudication was pronounced against the bankrupt. From the evidence it appeared that Mr. Woodward had acted as the solicitor of the bankrupt for some years, but that after the 19th of December 1851, he was professionally engaged for the petitioners, and prepared for them the deed of assignment. In one of the actions in which execution had been issued, Woodward was himself plaintiff, and in the other attorney for the plaintiff. The judgments in both the actions had been obtained some years previous to the issuing the executions. The bankrupt did not appear to have had any personal knowledge of the executions having been issued.

The petitioners, after the execution of the deed by the bankrupt, possessed themselves of all his trade books, and after the adjudication refused to give them up to the official assignee. Under an order, however, made by the commissioner by

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*Statement.*

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*Statement.*

arrangement, these trade books were delivered to the official assignee to enable him to collect the bankrupt's assets; the assets to be held by him, after deducting the expenses of collecting them, for the parties who should be found to be entitled thereto.

The sum of 413*l.* having been realised by the official assignee the petitioners claimed the same under the deed of assignment, but the commissioner refused to allow the claim: from this decision of the commissioner the present petition was an appeal.

*Argument.*

Mr. *Swanston*, Mr. *Terrell*, and Mr. *Willes*, in support of the petition, contended that the deed was a valid assignment, to the benefit of which the petitioners were entitled, and that it was not an act of bankruptcy. The deed could not be void on the ground of fraudulent preference, as the execution of it was not the spontaneous act of the bankrupt, but was obtained from him under a threat of legal proceedings, and there was nothing to shew that bankruptcy was contemplated by him: *Ogden v. Stone* (a), *Van Casteel v. Booker* (b), *Cook v. Pritchard* (c), *Mogg v. Baker* (d), *Morgan v. Brundrett* (e), *Aldred v. Constable* (f), and *Exparte Simpson* (g). The assignment was not an act of bankruptcy. It did not include the whole of the bankrupt's property; but his furniture and stock in trade, which formed a material portion of his estate, were retained by him. Upon this point they referred to *Siebert v. Spooner* (h), *Compton v. Bedford* (i), *Carr v. Burdiss* (k), *Law v. Skinner*. (l)

Mr. *Rolt* and Mr. *Bagley*, for the assignees. The petitioners and the bankrupt must be taken to have had full notice of the state of the bankrupt's affairs at the time the deed of assignment was executed, Mr. Woodward having been professionally employed by them. Although the furniture and stock in trade were not included in the deed of assignment, it was known to Woodward that they were already bound by the writs placed by him in the hands of the sheriff; *Louthal v. Tonkins*. (m) The whole of the bankrupt's property was therefore in fact included in the assignment, which was executed with a view to a distribution of his property different to that which would take place on a bankruptcy. The deed was a fraudulent conveyance

- (a) 11 M. & W. 494.
- (b) 2 Exch. 691.
- (c) 5 M. & G. 329.
- (d) 4 M. & W. 348.
- (e) 5 B. & A. 289.
- (f) 4 Q. B. R. 674.

- (g) 1 De G. 9.
- (h) 1 M. & W. 714.
- (i) 1 W. Bl. 362.
- (k) 1 C. M. & R. 443.
- (l) 2 W. Bl. 996.
- (m) 2 Eq. Ca. Ab. 381.

within the meaning of the 67th section of the Bankrupt Law Consolidation Act, 1849, and must be deemed to be an act of bankruptcy, *Porter v. Walker* (a), *Lindon v. Sharpe* (b), *Dutton v. Morrison*. (c) If the effect of the assignment were to defeat or delay creditors, the bankrupt's intention as to it was unimportant, *Stuart v. Moody*. (d)

Mr. Swanston, in reply, referred to *Exparte Bourne*. (e)

LORD JUSTICE KNIGHT BRUCE said that the question in this case was as to the validity or invalidity of a deed of mortgage or security executed by the bankrupt in favour of certain creditors, the appellants, very shortly before the petition for adjudication in bankruptcy, — the validity or invalidity of the deed as against the respondents, the assignees under the bankruptcy. With the doctrine of fraudulent preference, at least in its ordinary sense, that was, the technical sense of the expression, the Court had nothing to do, for the transaction was not of the bankrupt's seeking. The deed was obtained under pressure on the part of the creditors who obtained it, and was his unwilling rather than his willing act,—a state of things consistent nevertheless with the possibility that the deed might have been an act of bankruptcy within the 67th section of the Bankrupt Law Consolidation Act, 1849; or it might be void as against the respondents, as contrary to the policy of the act. The deed was executed by the bankrupt between eight and nine o'clock on Saturday evening, the 20th of December, 1851, and the petition for adjudication in bankruptcy was filed on the 23rd, and the adjudication took place on the 24th of the same month. The adjudication, however, did not depend for its validity upon the question whether the deed was valid or invalid as against the respondents. It was clear that the bankrupt, at the time when he executed the deed, was to his certain knowledge deeply insolvent, and that he was then subject to two judgments, upon which execution on that day had issued, and which were put in force by the sheriff against the stock in trade and furniture of the bankrupt on the 22nd. The deed was prepared by Mr. Woodward, who throughout the transactions had acted for the appellants as their solicitor. Mr. Woodward had, down to the 19th of December, acted as the bankrupt's solicitor, and he must be taken to have prepared the instrument with a general, if not

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*Argument.*

*Judgment.*

(a) 4 M. & G. 686.

(b) 6 M. & G. 895.

(c) 17 Ves. 193.

(d) 1 C. M. & R. 777.

(e) 16 Ves. 145.

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*Judgment.*

a particular, knowledge of the insolvency of the bankrupt, or at least to have had reasonable grounds for suspecting his affairs to be desperate. Mr. Woodward was plaintiff himself in one of the actions in which execution was issued, and was the attorney for the plaintiff in the other, and had directed the issuing of the executions before the deed was signed; and he obtained the deed knowing or expecting at the time that the execution then issued would be put in force on the following Monday morning, and that the effect of the executions, with the deed, or of the deed alone, must be the stopping of the bankrupt's trade, and the completion and publication of his ruin. It was plain, from the nature of the deed, and the amount of the bankrupt's property and debts, that if the executions had been put in force on the morning of the 20th, as they were on the 22nd, and the bankrupt had executed the deed with the knowledge of that circumstance, the deed would have been void against the assignees under the bankruptcy as comprising substantially all the available property of the bankrupt, and as inconsistent with the continuance of his trade. It was said that when he executed the deed, he was not aware that either of the executions had issued. Considering the nature of the deed, and all the circumstances, his lordship thought that this made no difference, especially as he must at the time have been aware of Woodward's connection with the judgments, and aware that Woodward, knowing what he did, would not delay to enforce them by execution.

Substantially, the only property of any value comprised in the deed consisted of the policies of assurance and the debts; and the only property not comprised in the deed was the furniture and stock in trade, which were seized under the executions, the whole of which could not be fairly considered to have been more than sufficient to answer the sums for which the executions were issued. The bankrupt's books, in accordance with the terms of the deed, were, as the evidence had satisfied his lordship, delivered to the appellant's solicitor on the 20th of December, to enable him to ascertain who the debtors were, and give them notice of the assignment, in which the books were by express words included. It appeared that these acts of the bankrupt were inconsistent with the ordinary probability of his being able to continue to carry on his trade after that day. It must have been known to him, and to Woodward, to have been so, whether he was aware or ignorant at the time of the actual issuing of the executions. How, with all the debts assigned,

with nothing, or nothing but furniture and stock in trade left, and his books given up, was it possible for him to go on?

Being, as his lordship was, of opinion that the execution of the deed, and the delivering up of the books formed part of the same transaction; being, as he was, of opinion that when the bankrupt put his hand to the instrument he could not but have known that all chance of continuing in trade fairly, or substantially, or otherwise than colourably, was by that act destroyed; considering the well-known decisions before those of *Porter v. Walker* and *Lindon v. Sharp*, and considering those two decisions also, his lordship was satisfied that to hold this deed void as against the respondents, the assignees under the bankruptcy, was not only right, morally, as between the immediate parties to the present controversy, and not only for the general interests of society, but warranted both by authority and reason. His lordship was of opinion, therefore, that the appeal should be dismissed with costs.

LORD JUSTICE TURNER said, that he concurred in the opinion that this deed was void as against the respondents. Two points were relied upon in support of the deed; the first being that a considerable part of the estate of the bankrupt, namely, his stock in trade and furniture, were not affected by the deed; the second, that there was no proof of an intention on the part of the bankrupt to defeat or delay his creditors. As to the first point, it was admitted that if all the estate had been comprised in the deed, it would have been void; but it was argued that, a substantial part of the estate not being comprised in the deed, the case did not fall within the principle of the decisions as to the assignment of the entire estate. His lordship apprehended that the true principle was, whether there was such an assignment as to prevent the bankrupt's trade being carried on; he agreed with the commissioner, that carrying on his trade meant carrying it on in the ordinary and usual course. This doctrine was laid down by Lord *Mansfield* in the case of *Hooper v. Smith* (a), where he said, "Indeed, if a man makes over so much of his stock in trade as to disable himself from being in trade, this would be fraudulent. It would be, as I said in *Compton v. Bedford* (b), an assignment of his solvency." This doctrine might possibly now be considered as going a little too far, but it nevertheless showed the principle upon which the cases proceeded, for the reason why an assignment of the entire estate constituted an act of bankruptcy was, because the bankrupt was thereby prevented from carrying on his trade; and that equally

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(a) 1 W. Bl. 441.

(b) Ibid. 362.

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applied where the trader assigned so much of his property as prevented him from carrying on his trade in the ordinary way. Now this bankrupt had assigned all debts, and all bills of exchange, and promissory notes, and other securities, and all books of accounts in which such debts or sums of money were entered; and it was impossible to say that the trade could be carried on in the usual and ordinary course without books of accounts evidencing the debts contracted in the trade. His lordship, therefore, considered that the deed could not be supported on the first point. With respect to the second point, it was impossible to doubt that, under the circumstances, an intention to defeat or delay his creditors must be imputed to the bankrupt. It was attempted in the reply to support both points, on the ground that the bankrupt had no knowledge of the intention to issue execution against him upon the judgments. That attempt, however, in his lordship's opinion failed, on the first point, because the assignment was such as to prevent the trade being carried on; and, as to the second, the other circumstances were sufficient to establish the intention of the bankrupt. The appeal must be dismissed with costs.

Solicitors, *J. & J. H. Linklater*; and *Lawrance & Plews*.

COURT FOR  
 RELIEF OF  
 INSOLVENT  
 DEBTORS.

May 30.

Sect 28. of 7 &  
 8 Vict. c. 96.  
 enacts "That  
 if no day be  
 named for  
 making the  
 final order, or  
 if the con-  
 sideration of  
 such final order  
 be adjourned  
*sine die*, or if  
 the final order  
 be refused, the  
 commissioner

shall have the power after the expiration of such time, &c. to make an order to protect such petitioner from being taken or detained under any process whatever." &c.

Sect. 29. provides, "That if such petitioner shall be taken or detained under any process whatever for any debt or claim in respect of which he is protected from process by such order as last aforesaid, it shall be lawful for the commissioner to order any officer who shall have such petitioner so in custody, to discharge such petitioner therefrom."

C., who had obtained his final order, being sued for a debt which was set out in his schedule, allowed judgment to go by default, and was taken in execution on a *ca. sa.*

*Held*, that the provisions of the latter section are applicable to a final order as well as an order for protection. Secondly, that a *ca. sa.* is process within the meaning of the section, from which the Court can order a discharge. Thirdly, that the insolvent's right to a discharge was not prejudiced by his failing to appear and plead the adjudication on being sued, and that he was therefore entitled to be discharged from custody.

## RE JOHN COPPINS.

Before MR. COMMISSIONER LAW.

THE facts of this case will sufficiently appear from the judgment.

MR. COMMISSIONER LAW. This is an application to discharge the defendant, John Coppins, from custody, under the powers given to this court by section 29. of the act 7 & 8 Vict. c. 96. He petitioned and obtained a final order under the protection statutes in July, 1851. The creditor, James Bramwell,

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*Judgment.*

was by mistake, entered in the schedule as Edward Bramwell; but no objection is made upon that ground. It is admitted that he duly received notice of the hearing, and that the debt is within the protection of the final order. The point taken against the purpose of this summons is, that as the defendant might have appeared and pleaded the final order, he ought to have done so; and that, after judgment, he cannot be relieved. (a) The claim arises on a bill drawn by the insolvent, and accepted by one Reynolds, in July, 1847. The insolvent was never sued upon it, either before or since his insolvency, until March of the present year; when it was contrived by some false story to bring him into the city to a tavern in Basinghall Street, near to the office of the plaintiff's attorney, that he might be served with a notice of action in the Lord Mayor's Court. Shortly afterwards he was further enlightened on the subject, by being captured on a process from the Queen's Bench, to which court the plaintiff had removed the cause. The defendant claims relief on these words of the second Protection Act, 7 & 8 Vict. c. 96. "If such petitioner shall be taken or detained under any process whatever for any debt or claim, in respect of which he is protected from process by such order as last aforesaid, it shall be lawful for the Commissioner to order any officer who shall have such petitioner in custody to discharge such petitioner therefrom." It is not disputed that this clause is applicable to a final order. If such question were raised, I should adhere to the opinion which I expressed long ago in the case of Symonds. (b) It is admitted, then, that I must order this party to be discharged, if he has been taken under any process whatever for a debt, in respect of which he is protected by the order of this court. This debt being within the protection of the order, the only question must be upon the other words of the clause—Is the process in this case, namely, a *ca. sa.*, a process from which I can order the discharge? It is true that he could have appeared and pleaded the final order. The first act gave that plea, which is an appeal to the assistance of another court. The second act gives a remedy in this court, and a more effective one as concerns the person; for it enables us to discharge him from arrest; and the power is largely expressed: it is to be exercised, whatever be the process on which the person is taken. It was doubted at one time whether the plea given by the first act was available under the second act; and it was settled that it was available. But it will hardly be contended that a provision concerning other courts is to control the plain words of the latter

(a) 5 & 6 Vict. c. 116. s. 10.

(b) 15 L. T. 304.

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*Judgment.*

act, which gives an express power to this court: my duty must depend on rightly construing the words of this enactment, and they seem to me, to comprehend the process on which this party has been taken. Can it be thought that the legislature only intended mesne process? They have not so spoken; they have said "any process whatever," which includes final process. Arrest on mesne process can be made in two instances; first, on special order, when it is sworn that a defendant is about to leave the country; secondly, when a petitioner, under 1 & 2 Vict. c. 110., has received an unfavourable adjudication. Arrest in the latter case could not be a process thought of in the 29th section of that statute, for it could not concern a debt which was within any final order. Accordingly, if it were urged that the final process is not within that section, it must be contended that by the words "any process whatever," the legislature intended only the special process used to prevent a defendant's leaving the country. Those general words will not bear such contracted meaning. And, indeed, the danger against which that process is directed would hardly have provoked such an enactment. It is not probable, though possible, that a plaintiff should have the effrontery to swear that a defendant is running away from an action in a case where he himself has, through legal inquiry, lost the right to bring it. Further, can it be thought that the legislature only meant to speak of process which has been put in force before the date of the order, and that the power of discharging is not given as to captures made after that date? If any one contends for this, I think a sufficient answer is given in the words "shall be taken or detained;" the word "taken" evidently meaning a fresh taking. Thus it fully appears to me that the words of the 29th section embrace the case which I am now asked to deal with. But I will notice the further argument which I have heard on the necessity of pleading. I am aware it has been said by high authority, that a man who has the benefit of the act 1 & 2 Vict. c. 110., must plead the adjudication, and that the judge of a superior court can only give a summary discharge from arrest on mesne process. The reason of that limitation must be this — the 90th section of that act giving the judge the power of discharge, ends with these words, "such prisoner causing a common appearance to be entered for him or her in such action or suit." These words being the same as in the earlier acts, evidently contemplate arrest on mesne process; if the clause is read without these words, the enactment has the full effect of giving relief against all process, final as well as initial; there are no other words of qualification or restriction. Fortunately for the small tradesmen who come



here for protection under insolvency, the 29th section has no such words as I have referred to, or anything equivalent or similar. Our duty of enforcing their personal protection is to be exercised against "all process whatever;" there is no intimation of restraint or exception, direct or indirect; and in my opinion, it is fit that the law should so maintain its own decrees. Some, perhaps, may think it a better policy, that the right of personal safety, if not sought by appearance and plea, should be forfeited altogether. I cannot think that a plaintiff, who pursues an action which he knows he has no right to pursue, becomes an object of commiseration, because the defendant not stopping him with a plea, leaves him to go farther in following up an unjust claim; but, I do think that a defendant, who ought not to be sued at all, is an object of commiseration, if, because he cannot employ an attorney to combat prosecution, he is to lose protection against a plaintiff, between whom and himself, that protection has been decreed on fair legal inquiry. If he were stripped of it through such a cause, a few malignant creditors would easily crush any poor man who had obtained his final order, by inflicting summonses upon him; some would come from Westminster Hall, some from the city, some from county courts; and he would be quite incompetent to stem them all by pleading. Thus to overwhelm him would be no credit to the law; and it is just that he should be able to vindicate at all times his personal privilege against those who have no right to lay a scheme for assaulting it. I am glad, therefore, that this 29th section is framed in such general terms. It is well, also, that in another respect it differs from the kindred clause in the Insolvent Act, 1 & 2 Vict. c. 110., namely, that on a future arrest this court can itself sustain a protection which it has pronounced. Under that act, the law is this — if a man at the time when the benefit of the act accrues to him requires to be discharged from an existing detainer, this court gives the warrant. If at a subsequent period he is arrested, he must go to the court whence the process has issued. This latter power is given by that act to the superior court alone. The Protection Act usefully gives the power to this court. I do not conceive that anything prevents the exercise of similar power in the superior courts, inasmuch as, they can always control and regulate their own process. The value now to a defendant of finding the power here, and not having to rely on the arresting court, is in this — the arresting courts are greatly multiplied. The facility of imprisoning is such, that a small trader coming into embarrassment is driven to seek protection for his person if he can honestly obtain it. A decree in favour of that privilege will not

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*Judgment.*

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*Judgment.*

benefit him unless it can be enforced; and, if he looks for the enforcement of it to the same quarter which threatens him with arrest, he will often look for it in vain. These are my reasons for thinking that the 29th section requires me to discharge this party; and the jurisdiction to do so, is a useful and necessary jurisdiction.

Attorneys, *Bickley*; and *Buchanan*.

LORD  
CHANCELLOR.

June 11.

Where a person who has been adjudicated bankrupt does not show cause against the validity of the adjudication before the commissioner within the period prescribed by s. 104. of stat. 12 & 13 Vict. c. 106., or commence "an action, suit, or other proceeding to dispute or annul the fiat," &c., within the period prescribed by s. 233. of the same statute, the Court will not annul the adjudication on a petition of the bankrupt, notwithstanding it appears that at the time of such adjudication the bankrupt was a minor under 20 years of age.

Where a person who has been adjudicated bankrupt does not show cause against the validity of the adjudication before the

## EXPARTE JOHN WEST, THE YOUNGER, IN RE W. WEST, AND J. WEST, THE YOUNGER.

THE petitioner, John West the younger, carried on for twelve months the business of a grocer and linendraper, in partnership with his brother, William West. On the 2nd March, 1853, a petition for adjudication of bankruptcy was filed against William West, and John West the younger, and on the 5th of the same month they were adjudged bankrupts. The petitioner was born on the 28th day of September, 1833, and consequently was now under twenty years of age. On the 5th of March, 1853, the petitioner, and, on the 8th of March, William West, surrendered to the bankruptcy, and consented to the same being forthwith advertised under the provisions of section 104. of the Bankrupt Law Consolidation Act, 1849. On the 27th of April, 1853, the petitioner presented a petition to the Chief Commissioner of the Court of Bankruptcy, alleging that he was ignorant, at the date of the said petition in bankruptcy, that the fact of his being a minor would discharge him from the effects of such fiat, and praying that the said petition, and all subsequent proceedings taken thereunder, might be annulled as against him. That petition was heard on the 2nd May, 1853, before Mr. Commissioner *Holroyd*, by whom it was dismissed. (a) The present petition was presented to the Lords Justices of the Court of Appeal in Chancery as an original petition, and was heard by the Lord Chancellor, at the request of their lordships.

Mr. *Lovell* for the petitioner. The present case is distinguishable from the case of *Carter v. Dimmock*. (b) There the alleged bankrupt was an adult; in the present case he is an infant of about nineteen and a half years old. A fiat in bankruptcy against an infant is absolutely void, as, an infant cannot

(a) 1 Bank. & Insolv. Rep. 20.

(b) 1 Bank. & Insolv. Rep. 12.

commissioner within the period prescribed by s. 104., a petition to annul such adjudication may be presented within the period prescribed by s. 233.; but such last-mentioned petition should be presented to the lord chancellor, and not to the commissioner.

enter into any contract which would support a fiat; *Belton v. Hodges* (a), *Exparte Adams* (b), *Exparte Henderson* (c), *O'Brien v. Currie* (d), *Thornton v. Islingworth*. (e) The only ground on which a commission has been supported against an infant has been that of fraud; as in *Exparte Watson* (f), where the infant had held himself out as an adult. In *Exparte Moule* (g), a certificate had been granted, and there was some evidence of trading after the infant became adult. In *Exparte Bates* (h), the infant had, on the occasion of his marriage, twelve months previous to his bankruptcy, made an affidavit that he was of legal age. In *Exparte Watson* (i), the infant had traded for two years as an adult. The case before the Court presents none of these features; the petitioner distinctly swears "he never represented himself to any person whomsoever to be of full age, or twenty-one years old."

Mr. Russell for the assignees. My objection is, first, that the original petition to the commissioner; and, secondly, that the present petition, is too late. [*The Lord Chancellor*. The question is, whether the circumstance of the party being an infant, makes the provisions of the act inapplicable?]

Mr. Lovell contended that the act did not apply to an infant. Suppose a father united the name of his infant child with his own, and the infant was three years old; that the trade was carried on for six months in the name of father and son; that the father then absconded, taking the infant with him; that a joint fiat issued; that the bankrupts did not surrender, and were outlawed; and that, on the infant attaining nineteen years of age, he was informed for the first time, he was a trader sixteen years ago, was then adjudged bankrupt, and by not surrendering to the fiat committed a felony, and was liable to transportation. Could it be contended the act applied to such a case? He thought not; and yet if the construction insisted upon on the other side were to prevail, the argument must be carried to that length. Here it is in evidence, that the proceedings were accelerated under the 104th section, by the consent of the infant, when, as such, he was incapable of giving any consent. In *Exparte Phipps* (k), Lord Justice Knight Bruce, when vice-chancellor, held, that the bankrupt was not precluded by the 24th section of 5 & 6 Vict. c. 122., which is analogous to section 233. of the 12 & 13 Vict. c. 106., from disputing the validity of the fiat on

1853.

EXPARTE JOHN  
WEST, THE  
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AND J. WEST,  
THE YOUNGER.  
*Argument.*

- (a) 9 Bing. 365.
- (b) 1 V. & B. 493.
- (c) 4 Ves. 163.
- (d) 3 C. & P. 283.
- (e) 2 B. & C. 824.

- (f) 16 Ves. 265.
- (g) 14 Ves. 602.
- (h) 2 M. D. & D. 337.
- (i) 16 Ves. 265.
- (k) 3 M. D. & D. 488.

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THE YOUNGER.

*Argument.*

other grounds, notwithstanding the twenty-one days had elapsed. He also referred to *Exparte Simpson*. (a)

Mr. Russell and Mr. Lucas for the assignees. The bankrupt was bound by the proceedings, having applied for and obtained his protection; *Goldie v. Gunston*. (b) They also referred to *Prideaux v. Webber* (c), and *Exparte Watson* (d); and contended, that the present petition was irregular, inasmuch as, it did not disclose the fact of a prior application having been made to the commissioner; and although the present was in fact an appeal from his decision, yet the petition was framed as an original petition. [*The Lord Chancellor*. The petition is rightly framed as an original petition.]

Mr. Allnutt appeared for William West.

Mr. Lovell replied.

*Judgment.*

THE LORD CHANCELLOR. This petition cannot be maintained. Nothing is clearer in legislation than that the Statutes of Limitation would have bound all persons, but for the exceptions contained in them; and why were express exceptions made in those acts? The answer is, because, if there were no such restrictions, all persons, including infants and idiots, would be bound by the terms of them. From this I must conclude, that when a clause of limitation is introduced into an act without any exception, the intention of the legislature was, that there should be no exception. I am not at all clear that the legislature did not intend infants to be included; but, of course, I do not decide the case on any such ground; I am guided by the language of the statute, and that is express. I can, therefore, come to no other conclusion than that the infant is bound. If the petitioner is not precluded from applying to annul this adjudication, he would not be precluded from doing so fifty years hence. The petition must be dismissed. I give no opinion whether the petitioner can or cannot establish his case at law. I leave that question open.

Petition dismissed. Costs of the assignees, and of the other bankrupt (William West), out of the estate. (e) Solicitors, *Tucker*; and *Heather*.

(a) 1 De G. 27, 28.

(b) 4 Camp. 381.

(c) 1 Lev. 31.

(d) *Ubi supra*.

(e) By the 18th section of the Bankrupt Law Consolidation Act, 1849, the Lord Chancellor may, in

his discretion, permit an appeal to the House of Lords. The parties being desirous that the above decision should be reviewed, have applied to his Lordship to approve a special case, and for permission to present such petition of appeal.

1853.

## EXPARTE SWAIN, IN RE SWAIN.

Before MR. COMMISSIONER FANE.

COURT OF  
BANKRUPTCY.

May 28.

ON an application to the Court of Bankruptcy in 1847, under the 28th section of 7 & 8 Vict. c. 96., that the insolvent might pass his first examination, he was adjourned *sine die* without protection, with liberty to apply for protection under that section, when he should have undergone three months imprisonment, or after twelve months from that date. Subsequently a creditor, who was entered as a creditor in the schedule for 16*l*., sued the insolvent in one of the Superior Courts, and recovered judgment; but as under the provisions of 1 & 2 Vict. c. 110., he could not arrest the insolvent for a debt under 20*l*., he brought another action upon his former judgment, for debt and costs amounting to 24*l*., and recovering judgment thereon, arrested the insolvent, and lodged him in Aylesbury gaol.

An insolvent, who has been adjourned *sine die*, without protection, until after twelve months from the date of such adjournment, is entitled to his protection after the twelve months have expired under 7 & 8 Vict. c. 96. s. 28.; and to his discharge under s. 29.

Mr. Lucas now applied under section 28. of 7 & 8 Vict. c. 96. for the insolvent's protection; and for his discharge under the 29th section.

MR. COMMISSIONER FANE granted protection; and an affidavit being filed by the insolvent, that the debt, in respect of which the insolvent had been arrested, was the same debt as was included in his schedule in August 1847, plus the costs of the two actions, signed his discharge.

Judgment.

Solicitor, B. Wilson.

## EXPARTE SMITH, IN RE COLLIER AND COLLIER.

Before MR. COMMISSIONER EVANS.

COURT OF  
BANKRUPTCY.

June 23.

MESSRS. SMITH and Company, the mortgagees in this case, agreed to accept a composition of ten shillings in the pound, payable by instalments, in full satisfaction of their debt, and covenanted, after payment thereof to release the bankrupts,

A mortgagee agreed to accept a composition in respect of his mortgage debt, upon con-

dition that if any instalment should be unpaid for ten days after it had become due, the mortgagee should be remitted to his original rights and remedies. He proved under the bankruptcy for the amount remaining due upon the composition, no instalment being then in arrear. — Held, he had made his election to come in under the bankruptcy, and could not take advantage of the condition to inere his proof upon default subsequent to such proof.

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EXPARTE  
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and reassign the mortgage securities. The composition deed contained a proviso, that if default should be made in payment of any instalment for ten days after it had become due, every payment previously made should be treated only as part payment of the original debt, in respect of which Messrs. Smith and Company should be remitted to their original rights and remedies. On the faith of this composition the creditors consented to an arrangement in respect of their claims. The instalments under the composition deed were regularly paid up to February 1853, the last instalment being paid by the assignees. Another instalment becoming due on the 1st of May, and not paid, Messrs. Smith and Company attempted, at the dividend meeting on the 3rd, to postpone the proof of their debt, but being unsuccessful, they proved for the amount of the remaining instalments payable under the composition deed. They subsequently gave up the lease of the premises, and consented that satisfaction should be entered upon the judgment, which they held as collateral security, but retained the composition deed and the judgment.

Argument.

Mr. *Starling* (solicitor) now applied for leave to increase the proof of Messrs. Smith and Company, by treating the payments made under the composition deed as made under the original mortgage, by reason of the default in May, and to prove for the remainder.

Mr. *Lucas*, for the assignees, objected that at the dividend meeting this Court had refused a similar application on the part of the mortgagee, and therefore the proper course was to have appealed from that decision under section 12. of the Bankrupt Law Consolidation Act. The time has now gone by. (a) 2ndly. The mortgagees having proved, had made their election, and are now precluded by section 182. (b) from again setting up the mortgage; *Exparte Downes*. (c) 3rdly. Assuming they had not proved, the composition deed might be pleaded to any action brought upon the original debt. When under a composition deed nothing is due at the time of the bankruptcy, the creditors are not remitted to their original rights; *Exparte Peele*. (d) See also *Exparte Vere* (e), *Eden's Bankrupt Law*. (f) Another feature is the composition with the other creditors entered into on the

(a) By the twelfth section of 12 & 13 Vict. c. 106., appeals must be brought within twenty-one days.

(b) The 182nd section enacts, that the proving or claiming a debt under a fiat or petition for adjudication by any creditor, shall be deemed an election by such creditor

to take the benefit of such fiat or petition with respect to the debt so proved or claimed.

(c) 1 Rose, 96., 18 Ves. 290. S. C.

(d) 1 Rose, 435.

(e) 1 Rose, 281.

(f) p. 125.

faith of this transaction, upon whom therefore it would be a fraud to set up the mortgage debt.

Mr. *Starling* replied. In *Ex parte Peele*, a release had been given. In *Ex parte Vere*, the original debt was revived. This is a debt due upon a contingency. At the dividend meeting we proved for all we were entitled to.

1853.

EX PARTE  
SMITH, IN RE  
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MR. COMMISSIONER EVANS. It appears to me that the mortgagees have made their election to come in under the bankruptcy. They have given up their security to the assignees. The case of *Ex parte Downes* seems to govern this case, and decides the point.

Judgment.

Application refused.

Solicitors, *Starling*; *Chippendale*.

## RE EDWIN HUTCHINSON.

Before MR. COMMISSIONER LAW.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

July 6.

MR. COOKE moved for a rule to show cause why the issuing of the vesting order in this case should not be stayed to afford time to the defendant's attorney to apply to a judge at chambers for a discharge on payment of debt and costs. (a) The application was supported by the affidavit of Henry Hutchinson, a brother to the defendant, from which it appeared, that in January of the present year, the defendant had been held to bail on a judge's order, at the suit of Ralph Hutchinson. The action had since been proceeded with, and a judgment obtained; and in February, the defendant was charged in execution for a sum of 280*l.* and costs. The affidavit further alleged, that the deponent having received information of the plaintiff's intention to apply to this Court for a vesting order under section 36. of 1 & 2 Vict. c. 110., had, on the 5th July, called at the office of his attorneys, Messrs. Bell and Broderip, and tendered to them the amount of debt and costs; and that Mr. Bell said he did not know if he should be authorised to receive the money; but if

Where a prisoner remains in custody for twenty-one days, without making satisfaction to his detaining creditor for the debt and costs for which he is detained, and the detaining creditor applies for an order vesting the estate and effects of such prisoner in the provisional assignee, under sect. 36. of 1 & 2 Vict. c. 110., the Court has no power to interfere to stay the issuing of the vesting order.

(a) In *Drury v. Housefield*, 11 A. & E. 101., it was held, "Where a creditor, on his petition to the Insolvent Debtors' Court, has obtained an order vesting the estate of his insolvent debtor in the provisional assignee, such creditor is not bound,

on the debtor afterwards tendering the amount of debt and costs, to assent to his discharge from custody, nor will this Court (Q. B.) order such discharge as to the creditor's action, on an affidavit of tender and refusal."

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*Statement.*

the deponent would pay the expense of a despatch by telegraph to Mr. Snowball the attorney for the plaintiff at Durham, he would communicate with him; that deponent consented to this suggestion, and called again at the office in the afternoon, and then learned from Mr. Bell that he was directed not to receive the money, but to proceed to obtain the vesting order; that the usual petition and affidavit from the plaintiff had been lodged in the office of the Court some time in the afternoon of 5th July, and that on the morning of the 6th deponent had again tendered to Mr. Bell, in Bank of England notes, the amount of the debt and costs in the action, and the interest from the date of the judgment, but he had refused to receive it. [Mr. Commissioner *Law*. I doubt my jurisdiction.] It was clear the object of the creditor was to gratify some ill feeling, and not to secure the recovery of the debt; and it was submitted in such a case, that the Court had the power to withhold for a time the issuing of the vesting order.

*Judgment.*

MR. COMMISSIONER LAW. It seems to me that I have no jurisdiction to interfere in the case. The law gives to a creditor the right, after the expiration of twenty-one days, to file a petition, which is to be supported by such evidence as the Court may require. This is an application to delay the issuing of the vesting order; and it is founded on an affidavit, that the London agent of the plaintiff refused to receive the debt and costs which were tendered to him. What were his motives for doing so, I am not to inquire; all I know is, that the defendant has been in execution for five months, without taking any steps for his liberation. I don't think I have any authority to interfere to prevent the creditor from proceeding.

Rule refused.

Attorney, *Towse*.

COURT FOR  
 RELIEF OF  
 INSOLVENT  
 DEBTORS.

June 21.

The Court will dismiss the petition where the arrest is friendly, and there are no assets to be divided amongst creditors.

RE MARCUS BAIN.

Before THE CHIEF COMMISSIONER.

THE insolvent, a bricklayer and plasterer, applied for his discharge under 1 & 2 Vict. c. 110. It appeared, that in 1849, he had received, as executor to one Forder, a sum of 285*l.* 4*s.* 6*d.*, which had been left to the opposing creditors. It was alleged that 100*l.* had been lent to a Mr. Harvey for a temporary purpose; and that, subsequently, a second 100*l.* had been placed in his hands for the purpose of settling with the legatees; but he



had failed to return the first 100*l.*, and appropriated the second 100*l.* to his own purposes. It was admitted that the arrest was friendly, and with the view of applying to this Court.

Mr. *Sargood* submitted that the petition must be dismissed; it would be futile for the Court to pronounce a remand, because the friendly detainer would immediately discharge the insolvent from custody.

THE CHIEF COMMISSIONER dismissed the petition.

Petition dismissed.

Attorneys, *Indermaur* ; *Marshall*.

1853.  
RE MARCUS  
BAIN.

## EXPARTE HARVEY AND COMPANY, IN RE BLAKELY.

Before MR. COMMISSIONER FANE.

THE facts of this case will sufficiently appear from the arguments and judgment.

Mr. *Prentice* appeared for Harvey and Company, bankers, at Norwich, who, he stated, had advanced to Edward Theobald Blakely, in his account with their house, the sum of 2500*l.*, on the guarantee of his father, Edward Blakely, the bankrupt; that the father then agreed to join in a promissory note for the amount, if the bank would give up the guarantee, and advance a further sum of 750*l.* to the son on mortgage; that this being assented to on the part of the bank, a joint and several promissory note was given, as stated in the judgment, for 3030*l.*, to secure the said sum of 2500*l.*, and also a sum of 530*l.* secured upon two bills of exchange, drawn by the son upon, and accepted by the father, in respect of moneys advanced to the latter on a discount transaction, as was alleged, between him and the bank. This sum of 3030*l.* was now sought to be proved as against the bankrupt's estate; and in support thereof a statement of account was put in verified by affidavit.

Mr. *Reed* (solicitor) for the assignees, opposed; and contended that Harvey and Company never had any claim against the bankrupt upon the promissory note; and also that the statement of account put in was incorrect. Messrs. Harvey, by their affidavit, claimed "3030*l.* on a promissory note, dated the 14th December, 1852, payable on demand for money lent by, and at the request of Edward Blakely, by this deponent," &c., whereas

COURT OF  
BANKRUPTCY.

June 8.

A father and son executed a joint and several promissory note, to secure a debt due from the son. Subsequently, the son assigned all his property for the benefit of his creditors, and obtained from them a release, but the deed contained no reservation on the part of the creditor of his right to recover from the father, what the son's estate should be insufficient to pay. — *Held*, that the creditor, having released the son unconditionally, the father was released also.

*Argument.*

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 BLAKELY.  
*Argument.*

the money was lent to Edward Theobald Blakely, Edward Blakely being only the surety; and, therefore, Messrs. Harvey and Company were estopped from showing any other consideration; *Crofts v. Beale*. (a) [Mr. Commissioner Fane. I cannot enter into the doctrine of estoppel. I have no hesitation in deciding at once, that the affidavit does not estop Messrs. Harvey from proceeding.] The second point is, that the father is discharged by the release to the son, in accordance with the rule that where two persons are bound jointly and severally, a release of one is a release of both. As between the bankrupt and his son, the bankrupt was surety, and acted independently of these claims. As for the 530*l.*, that was not the debt of the father, but of the son. The affidavit is for money advanced to the son; and he has been released. The deed of assignment for some reason or other was not signed by any of the creditors of Edward Theobald Blakely. It was executed only by the trustees and the bankrupt. [Mr. Commissioner Fane. If this be so it is a mere nullity.] It is part of our complaint that this deed is not binding. There was an agreement between the trustees under the original deed, the creditors, and one Frost, whereby, for the purpose of winding up the estate, an account was to be made out, and an assignment of certain parts of the property to Frost. This was signed by every creditor of the bankrupt except two; and every one who signed this agreement has become a party, and bound himself by the assignment. A Court of Equity would restrain them from taking proceedings now. The agreement with Frost was between him and the trustees, with consent of the creditors, who by it transferred all the working plant and machinery of Blakely, jun. to Frost absolutely. The deed was placed in Messrs. Harvey's hands, and they took no proceedings against Mr. Blakely, after it had been executed; but they took proceedings against the son by filing a petition, and obtained a day for an adjudication in bankruptcy. Having thus put the matter in training for the proper distribution of the assets, they dealt with the bankrupt; and by so doing tied their hands up. He also cited *Newnham v. Stevenson* (b), to show that a deed, although void, might yet be valid as between the parties concerned.

Mr. *Prentice*, in reply, cited *Byles on Bills* (c) as an authority that, in the first instance, evidence is not admissible for the purpose of showing that the father was the surety, and the son the principal debtor. He contended that even if this were not so, the bankrupt was the principal debtor by the delivery of the

(a) 11 C. B. Rep. 172.

(b) 10 C. B. Rep. 713.

(c) p. 184.

two bills of exchange as a consideration for the note. [Mr. Commissioner *Fane*. The whole of the money was advanced to the son at the instance of the father.] The two bills of exchange were drawn by the son and accepted by the father. The son brought them to the bank, and the bank endorsed them in the usual way; but of the transaction as between the father and the son, Harvey and Company knew nothing. Not one of the creditors of Edward Theobald Blakely has signed the deed of assignment: the consequence is, it has fallen to the ground. The agreement to accept a composition was not signed by Frost; it was an incomplete instrument, and fell to the ground, like the deed of assignment, on which it depended. Thus, there was this anomalous state of things; the deed of assignment was no better than the agreement, and the agreement was no agreement at all. The collateral evidence shows that the principal was not released from his obligations, and even if the deed had been executed with the written assignment of both principal and surety, a Court of Equity would have decided that the bankrupt could not raise his present objections; *Lewis v. Jones*. (a) *Newnham v. Stevenson* (b) does not apply to this case; that, being a case of fraudulent preference, was decided entirely upon this point, that a fraudulent preference might be void as an act of bankruptcy at the election of the assignees. The foundation of the release was the assignment, and the assignment was of none effect.

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 EXPARTE  
 HARVEY & Co.,  
 IN RE  
 BLAKELY.  
 Argument.

MR. COMMISSIONER FANE took time to consider, and now delivered his judgment. This was an application by Messrs. Harvey and Company, bankers, of Norwich, to prove for 3030*l.* against the estate of the bankrupt, Edward Blakely, on a joint and several promissory note of the bankrupt, and his son, Edward Theobald Blakely, which had been given by them to the bankers to secure a debt of 3030*l.* due to them from the son. The objection was, that the bankers had, through one of their partners, executed a deed of trust, whereby, in consideration of the assignment of all the property of the son in trust for his creditors, the creditors who executed the deed released the son from all demands, and it was insisted that the release of the son, the principal debtor, was a release of the father, the surety. The correctness of this proposition was not disputed; but it was said for the bankers that it was thoroughly understood between the father, the son, and the bankers, that the release of the son should not operate as a release of the father, but that the bankers

Judgment

(a) 4 B. & C. 506.

(b) 10 C. B. Rep. 713.

1853.  
 EXPARTE  
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 IN RE  
 BLAKELY.  
*Judgment.*

should still be at liberty to sue the father for whatever they did not get through the son. But to this mode of putting the case there are two answers; first, that a release of the principal debtor of itself raises so strong an implication of an intention to release the surety, that it is scarcely possible to rebut it; for were it not so, it would be a mere shifting of the burthen, and not a release; and, secondly, if such really were the intention, it should have appeared on the face of the deed of release, otherwise the effect of the deed would be varied by parol evidence. This point was stated so long ago as 1819, in *Exparte Glendinning*. (a) Lord *Eldon* there said, "Ever since Mr. Richard Burke's case, the law has been clearly settled, and it is now perfectly understood, that, unless the creditor reserve his remedies, he discharges the surety by compounding with the principal; and the reservation must be upon the face of the instrument by which the parties make the compromise, for evidence cannot be admitted to explain, or vary the effect of the instrument." Lord *Eldon* there gave rather the technical and legal reason for the rule, than the real one, which is founded on the great principles of justice. Under an arrangement each creditor is at liberty to dictate his own terms, one asking more, another less; and every other creditor may acquiesce in, or reject them, but whatever each creditor does insist upon, that he must proclaim on the face of the deed. It is not pretended in this case that Messrs. Harvey reserved their right of suing the surety Edward Blakely *on the face of the deed*, and therefore they could not sue him if he were not bankrupt, nor can they prove against his estate now that he is.

Solicitors, *Sole, Turner, & Turner; Reed, Langford, & Marsden.*

(a) Buck's Rep. 517. 520.

COURT OF  
 BANKRUPTCY.

June 24.  
 July 1.

Assignees in bankruptcy are entitled to all such fixtures, set up for purposes of trade, as come within the principle of *Hellawell v. Eastwood*, 6 Exch. Rep. 295., and which the trader might remove.

Stock in trade in the possession of the bankrupt at the time of the bankruptcy, passes to the assignees.

## EXPARTE HUMPHREYS, IN RE GIBBS.

BEFORE MR. COMMISSIONER FANE.

THE petition in this case prayed the judgment of the Court, whether, the moiety of a lease, fixtures, and stock in trade, which had been assigned to one Pemberton, upon trust, to secure

a sum of 2100*l.* due to the petitioner in respect of the purchase of his share in the partnership property by the continuing partner, was or not vested in Pemberton, upon and subject to the trusts of the deed of dissolution of partnership, under the following circumstances. The petitioner being lessee of the premises, where he carried on business as a surgeon, chemist, and druggist, entered into partnership with one Ballard; and on the dissolution in 1847, it was agreed that Ballard should pay 2100*l.* as the purchase money of the petitioner's interest, and that the petitioner should assign to Pemberton his moiety in the partnership property and effects upon trust, after payment of the said sum, to convey to Ballard, who was also to have and use the partnership property until default, &c., with the usual power of sale. Ballard sold the business, in 1849, to the bankrupt, whom he let into possession, and who continued the business upon his own account to the time of his bankruptcy in March of the present year. In March, 1851, Ballard was in default to the petitioner to the extent of 555*l.* 1*s.* 8*d.* After the bankruptcy, the petitioner concurred in a sale by the assignees, and at such sale purchased the lease, fixtures, furniture, &c., without prejudice to his right to a moiety. It was in evidence that Pemberton was aware that Ballard had disposed of his property to Gibbs, and also that Gibbs had, immediately after being let into possession, set his name up over the door.

Mr. *Spinks* (solicitor), for the petitioner, divided the question into three parts; first, as regards the lease; secondly, as regards the fixtures; and, thirdly, as regards the goods: and contended that as to the fixtures, these were not goods and chattels within the meaning of section 125. of the Bankrupt Law Consolidation Act, but conceded that whatever was not fixtures must fall within this clause, as being in the reputed ownership of the bankrupt. He cited *Fraser v. Swansea Canal Navigation Company* (a), as to knowledge and reputed ownership, and agreed that actual consent was necessary to vest the goods in the assignees, and that mere acquiescence was insufficient. He also cited *Boydell v. Macmichael* (b), *Coombes v. Beaumont* (c), and *Minshall v. Loyd* (d).

Mr. *Bagley*, *contrà*. As to the lease, that stands upon the naked point of law. I do not suggest the bringing it within the doctrine of reputed ownership. As to the fixtures, there are none in any schedule connected with the lease, except only trade fixtures, which the tenant would be entitled to remove, and which do not fall within the denomination of fixtures in a ques-

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EXPARTE  
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IN RE GIBBS.  
*Statement.*

*Argument.*

(a) 1 A. & E. 354.

(b) 1 C. M. & R. 177.

(c) 5 B. & A. 72.

(d) 2 M. & W. 450.

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 {  
 EXPARTE  
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 IN RE GIBBS.  
 Argument.

tion of order and disposition. As to the stock in trade, this has been changed from time to time, and there is nothing left on the premises which can be earmarked as included in the assignment. The bankrupt was in full possession, and the trustee did not dissent. [Mr. Commissioner *Fane*. It appears to me that the word of the act should be *acquiescence* instead of *consent*.] The word *consent* in the act has always been construed *acquiescence*. *Joy v. Campbell* (a) was cited in the case of *Whitfield v. Brand* (b), as containing the whole doctrine of reputed ownership. There was a case before Mr. Commissioner *Fonblanque*, *Re Wood* (c), in which this doctrine was most fully gone into. He also cited *Helliwell v. Eastwood*. (d)

Mr. *Spinks* having replied,

Mr. Commissioner *Fane* said, I shall look into the case before Mr. Commissioner *Fonblanque*, and the other cases, before I give my decision.

Judgment  
 July 1.

MR. COMMISSIONER FANE now delivered judgment. In this matter, I think the order and disposition clause (e) does not apply to leases, but only to what are strictly goods and chattels. In regard to the fixtures, I have read the case *In re Wood* referred to by Mr. *Bagley*, as decided by Mr. Commissioner *Fonblanque* (f), and fully concur in the principle of that deci-

(a) 1 Sch. & Lef. 328.

(b) 16 M. & W. 286.

(c) Not reported, *vide infra*.

(d) 6 Exch. 295.

(e) 12 & 13 Vict. c. 106. s. 125.

(f) This case is not yet reported.

It was argued at great length by Mr. *Quain* for the equitable mortgagee, and Mr. *Laurance* (solicitor) for the assignees, on the 6th Sept. 1852. The question raised was, whether the plant and fixtures on the premises, consisting of malt-chamber, malt-mill, machinery, vats, &c., used by the bankrupt in his trade of a brewer, belonged to the mortgagees as attached to the freehold, or passed to the assignees under the bankruptcy. The commissioner took time to consider, and on the 29th October delivered judgment, which, both on account of the importance of the question raised, as well as the great care and attention bestowed upon it by the learned commissioner, is given at length. His Honour said, "Since this matter was last before me, I have very carefully consulted all the cases cited in the course of the argument, not only

so far as they might turn out to be necessary to the decision of the question now before me, but also as a matter of curiosity, to trace, if possible, the source of so much difference of opinion and of so much diversity of judgment. I think the source of diversity is to be found in the efforts of the law to adapt itself to the progress and exigencies of society. In early times the maxim '*cujus est solum, ejus est usque ad cælum*,' borrowed from the Roman law, prevailed without dispute. Land alone was regarded; land alone was called real; and mere personals were considered, as they really then were, of little moment, being comparatively of small amount. It was for this reason that, as Lord *Kenyon* says in *Penton v. Robart*, (2 East, 88.,) cited by the then Chief Justice *Erskine* in *Ex parte Loyd*, (3 D & C. 765.,) 'the old cases on this subject leant to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way, in favour of the tenants, in support of the interests of trade, which has

sion, and in the observations that accompany it. I think, in conformity with that decision, that all the fixtures set up for the purposes of trade, and which the trader might remove, belong

1853.

EXPARTS  
HUMPHREYS,  
IN RE GIBBS.

Judgment.

become the pillar of the state.' If this was true in the time of Lord *Kenyon*, it must have acquired additional force in the course of the last half century, when the advance of trade, and the use of expensive and complicated machinery in every branch of manufacture, has rendered this protection so essential to the interests of commerce, that if the Courts had been unable to find a remedy the legislature must have been called on for its interference. On examination of the case before me, I find it more simple than I had at first anticipated. Divers articles are found in the bankrupt's possession at the time of the bankruptcy. He was a brewer, and these articles are what are called brewers' plant and brewers' fixtures; and I may observe that much of the confusion of the cases has arisen from the popular use of the word *fixture*, without discriminating between the different degrees of annexation, varying from the solidity of a stone foundation to the tacking of a carpet or the hanging of a picture. The true question is, are they goods and chattels? for to goods and chattels only does the statute of James, and the subsequent statute derived from it, apply in its enactment as to order and disposition. Only goods and chattels could be taken in execution; only goods and chattels could be distrained; and, under both forms, such articles as the greater part of those now in question have been taken, with this exception,—that under a distress (while the law required that the goods should be removed from the premises) only such could be taken as could be returned on replevin in the same state. In questions between heir and executor, such articles also have been held to pass to the executor as personalty, and not to the heir as realty. For each of these purposes, therefore, the articles are held to be goods and chattels; why, then, are they not to be so held as between the mortgagee and the assignee of a bankrupt's estate? I confess I am unable to discover the reason either at law or in equity; whilst, in the policy of the law of bankruptcy, I see every reason to prefer the doc-

trine, that what is in the bankrupt's open possession, by the apparent ownership of which he obtains credit of the trading world, shall pass to the benefit of all his creditors rather than to one only, who by means of a private or secret conveyance has obtained a preference over them. As to what is strictly realty this is unavoidable, since the right to the realty must follow the title, and not the possession; but there is no reason for extending the right to the realty beyond this necessity, and in all doubtful cases I believe the courts will lean (as Lord *Kenyon* says they have leant) in favour of creditors and for the interests of trade. It is singular, however, that in the diversity of judgment which has prevailed on this subject, the decisions of the Court of Bankruptcy should be less favourable to creditors than those of the courts of common law. With the exception of Sir *G. Rose*, whose judgment in *Exparte Austen* I shall have occasion to quote, the judges of the Court of Review seem to have been inclined to favour the mortgagee; whilst the Courts at Westminster, from the case of *Horn v. Baker* (9 East, 215., 2 Smith's Lead. Cas. 123. S. C.), to that of *Helliwell v. Eastwood*, (6 Exch. 295.) have laid down principles which must necessarily lead to a contrary conclusion. Amongst these cases, that of *Trappes v. Harter* (3 Tyr. 603., 2 C. & M. 153. S. C.) is one of the most important. It was decided by Lord *Lyndhurst*, after he had been lord chancellor and therefore, when the law of bankruptcy was more familiar to him, than it might be to other judges less frequently called upon to determine questions of this nature. That case determined that utensils and machinery erected for the purposes of trade, and which could be removed without material injury to the inheritance, form an exception to the general rule as to fixtures, and are not to be taken as part of the inheritance, but as personal estate. This judgment is said to have been doubted by Baron *Parke*; but whatever respect might have been due to a doubt from such a quarter, the doubt itself is removed by the fact

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EXPARTE  
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Judgment.

to the assignees in case of bankruptcy. My attention has not been particularly directed in this case to the nature and description of the fixtures. It is possible that some of them may be-

that the learned baron has concurred in the judgment of *Hellivell v. Eastwood*. Another judgment has also been set up by this case; it is that of *Exparte Austen* (1 D. & C. 207.), in which Sir G. Rose said, 'I have no hesitation in saying, that when fixtures are capable of removal, as between landlord and tenant, without injury to the freehold, they are within the order and disposition of the bankrupt.' The soundness of this doctrine having been questioned, Sir G. Rose, in *Exparte Wilson* (4 D. & C. 143., 2 Mont. & A. 61. S. C.), expressed his adherence to that opinion, which now appears to be fully confirmed by the Court of Exchequer. I must, therefore, come to the conclusion, first, that such articles as merely rest upon the soil by their own weight, however heavy, are goods and chattels; secondly, that if they are slightly connected one with another, and ultimately with the freehold, yet may be severed without material injury to the freehold, they follow the same rule; thirdly, that articles, though themselves fixed to the freehold by bolts and screws, or nails, or pegs, or other similar contrivances, are also goods and chattels; fourthly, that articles mainly sunk in the soil, or built on it are of the realty, and do not pass to the assignees. I may also take the opportunity of saying, that I do not consider this judgment as in any degree overruling the judgment of my brother Commissioner *Holroyd* in the Vauxhall case (*Exparte Reynell in re Gye*, 2 Mont. D. & De G. 443. 637.). In that case there was this material distinction, that the fixtures had been originally annexed to the freehold by the freeholder, and had therefore by equity of title become one freehold property, and in that form they were demised to Hughes, the party who became bankrupt. Then as to the question, whether new things, newly affixed, also passed; that I think must have very much depended on the peculiar nature of the property, where, in order to fit up the place for a public exhibition, continual changes were necessary; and, therefore, as some of the old were removed, it was equi-

table that the new should be fixed with the same rights as those that were removed."

Mr. Commissioner *Goulburn*, who was also on the bench whilst this judgment was being delivered, entirely concurred in the principles laid down.

In *Exparte Plimmer, in re Summers*, a similar question arose before Mr. Commissioner *Evans*. The facts may be gleaned from the judgment, which was as follows: "It appears by the evidence that John Plimmer sued Summers the bankrupt, and a person of the name of Smith, then in partnership with the bankrupt, as acceptors of a bill of exchange, and obtained judgment for 500*l.* debt, &c. Plimmer paid out two executions that had been previously put in, and entered into possession of the property, and continued so until May, 1841; he then entered into an agreement with Summers and Smith. Summers and Smith remained in possession until 1846. At that period Plimmer sued them, and on a judge's order levied an execution on their goods, which were sold to him by the sheriff, Dec. 15. 1846, and Summers assigned his lease of the premises to John Plimmer for 100*l.*

"J. Plimmer carried on the business for some time. Summers took the benefit of the Insolvent Act, and afterwards again took possession of the premises as tenant to Plimmer.

"In Feb. 1847, J. Plimmer transferred to his brother, G. Plimmer, all his interest in the lease, machinery, &c. G. Plimmer entered into an agreement on the 4th March, 1847, with Summers, who was then in possession, and continued so to the time of his bankruptcy. G. Plimmer made a distress for rent due to him before the bankruptcy; it was contended, on the part of the assignees, that the transaction was a fraud between J. Plimmer and the bankrupt, and that, in fact, the bankrupt was not a debtor; and, secondly, that a large portion of the property passed, as being in the use, order, and disposition of the bankrupt.

"As to the question of use, order, and disposition, it appears to me that, to the world, the bankrupt was



long to the landlord; such, of course, would not pass to the assignees; but all that is not attached to the freehold, in short, all that comes within the principle of *Helliwell v. Eastwood* in the Exchequer, in my opinion, passes to the assignees. As to the stock in trade, that of course belongs to them also; and I think the petitioner has no reason to complain, as he has stood by for so long without asserting his rights.

Solicitors, *Spinks; Lawrance, Plews & Boyer.*

in possession of the house, fixtures, and machinery. It was contended, on behalf of G. Plimmer, that the property having been sold by the sheriff was sufficient to prevent it passing, as being in the use, order, and disposition of the bankrupt; but it has been repeatedly decided that such is not the case. See *Lingham v. Biggs*, 1 B. & P. 81.; *Lingard v. Messier*, 1 B. & C. 308.

"The remaining question is, what part of the property would pass as

being in the use, order, &c. ? It is quite settled that every thing fixed to the freehold will pass; that is, anything fixed with brick and mortar; *Horne v. Baker*, 9 East, 215.; *Exparte Bentley*, 2 M. D. & D. 591.; *Exparte Tagart*, 1 De G. 531. I think that all the fixtures will pass to G. Plimmer, and that the other things are the property of the assignees;" *Helliwell v. Eastwood*, 6 Exch. 295. 310. (a)

(a) See also upon this subject *Hickman v. Walton*, 4 M & W. 416.; *Exparte Belcher*, 4 D. & C. 703.; *Ryall v. Rowles*, 1 Vez. 348.; *Exparte*

*Quincy*, 1 Atk. 477.; *Exparte King*, 1 M. D. & D. 119.; and *Exparte Broadwood*, 1 M. D. & D. 631.

## EXPARTE PRICE, IN RE WILLIAMS AND MARCHANT.(a)

Before MR. COMMISSIONER FANE.

THIS was an application on behalf of one Price to enter a claim against the separate estate of the bankrupt Williams for 4000*l.* under the following circumstances:— The bankruptcy took place about eighteen months ago, and a dividend was declared for the 9th of July, by which the joint creditors would receive their debts in full, leaving a surplus for the bankrupts. Previous to 1848, Price, the bankrupt Williams, and one Aykroyd were in partnership as co-contractors for the completion of three several contracts; viz. the Holyhead harbour contract, the Birkenhead Extension railway contract, and the Mickleton tunnel contract; in respect of which they all contributed capital in different proportions. In December, 1848, and pending these contracts, they agreed to dissolve partnership as regarded Price and Aykroyd, who were to retire: Williams was to complete the contracts, and to have the use of the capital of the

1853.  
EXPARTE  
HUMPHREYS,  
IN RE GIBBS.  
Judgment.

COURT OF  
BANKRUPTCY.  
July 9.

Where an alleged creditor has, without any good reason, neglected to come in under the bankruptcy for eighteen months, and until the estate has been nearly wound up, he will not be allowed to enter a claim, with a view of staying a dividend.

Statement.

(a) Reported by A. A. Doria, Esq.

1853.

EXPARTÉ  
PRICE, IN RE  
WILLIAMS AND  
MARCHANT.

*Statement.*

other two until such completion, when each was to be repaid what he had brought in, and also one third of whatever profits should accrue upon the Birkenhead extension contract after such deductions: Williams was to have for himself all the profits arising out of the other two contracts. All the contracts were completed before the bankruptcy; but the settlement on the Mickleton tunnel contract was the subject of a reference, which was not concluded until the commencement of the present year. On the Birkenhead contract there was a clear profit of 12,000*l.*; and it was in respect of a third of this sum that the claim was now made.

*Argument.*

Mr. *Bagley*, for Price. We claim in respect of the profits declared on the Birkenhead contract: at the time of the dissolution of partnership in December, 1848, the Holyhead harbour contract was near its completion. Up to this time no question arises. The Birkenhead contract was afterwards taken up by Williams and Marchant, who received in respect of it large sums of money, which were placed to their joint account. The Mickleton tunnel contract was only settled at the commencement of the present year. We allege that a profit was made upon this contract, as well as upon the Holyhead harbour contract, but cannot state the amounts received upon each, because we have been unable to inspect the books. [Mr. Commissioner *Fane*. That is no reason why these accounts have not been taken before.] Price does not know the precise amount which he claims.

*Judgment.*

MR. COMMISSIONER FANE. This appears to me a strong proceeding on the part of Price; he comes at the last moment, when all the joint creditors are paid 20*s.* in the pound, and wants to enter a claim for 4000*l.*, and in this way to tie up the money from being paid over to Williams at the time Williams is about to start again in life. Price should have asserted his claim before. I shall not now admit it, on the ground of delay in not bringing the matter forward earlier.

A party will not be allowed to prove against the estate, and retain his securities. He must waive all lien in respect of the latter, or abandon his proof.

Mr. *Bagley* afterwards tendered a proof on behalf of Price against the separate estate of Williams for 2223*l.* 7*s.* 11*d.*, which Williams had, by deed dated the 24th of July, 1849, covenanted to pay for the purchase of Price's interest in certain cotton warehouses, in respect of which he and Williams were co-partners. So long as it was uncertain whether the estate would pay anything, Price stood upon his securities.

Williams the bankrupt being examined said, "that he executed the deed of covenant upon the representations of Price,

which proved to be false, and that Price had agreed to release him. Price had never sued him upon the covenant.

MR. COMMISSIONER FANE. If this were a claim I should not allow it; but as it is a proof, Price should have been here to be cross-examined upon his affidavit. A *prima facie* case is made out on the face of the deed. Under these circumstances I cannot refuse to admit it as a claim, Price undertaking to waive all lien upon the property comprised in the deed.

Mr. Bagley. Unless the proof be admitted, I cannot waive the lien. [Mr. Commissioner Fane. Then I shall reject the claim.] Mr. Bagley. Then, sir, I tender the proof.

Mr. Plews, solicitor for the assignees. I take a preliminary objection, that Price has not given up his securities.

Mr. Commissioner Fane. I decline to admit either proof or claim, until the alleged creditor abandons all lien upon the property comprised in the deed.

Mr. Bagley after conferring with his client said, we will abandon our lien, on the debt being admitted as a claim.

Claim admitted accordingly, subject to its being turned into a proof. Proof adjourned.

Solicitors, *Tatham & Proctor*; and *Lawrance, Plews & Boyer*.

1853.

EX PARTE  
PRICE, IN RE  
WILLIAMS AND  
MARCHANT.

## RE JOHN LONG. (a)

Before MR. COMMISSIONER PHILLIPS.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

July 9.

Where an insolvent had vexatiously defended an action which had been brought against him by his opposing creditor, — Held, to be no ground of complaint under the protection statutes.

Statement.

THIS insolvent, a policeman, had filed a petition under the protection statutes, and now appeared on his interim order.

Mr. Sargood opposed, and complained that the insolvent had vexatiously defended an action which had been brought against him at the suit of the opposing creditor to recover a sum of 16*l*. It appeared that the insolvent had carried on the business of a farmer in the county of Somerset up to the year 1846, when he relinquished that business, and obtained a situation, which he still held, in the metropolitan police. In 1846 he had purchased some sheep of the opposing creditor, but in consequence of a dispute respecting the price, he had never made any payment on account of the purchase. On being sued in 1853 he pleaded the Statute of Limitations, but a written acknowledgment being produced at the trial, the plaintiff had a verdict for the sum claimed. In consequence of the defence, the plaintiff had been put to an additional expense of 15*l*.

Mr. Dowse, on behalf of the insolvent, urged, that as the com-

Argument.

1853.  
 RE JOHN  
 LONG.  
*Judgment.*

plaint alleged was not mentioned in the act of Parliament, the Court could not entertain it.

Mr. COMMISSIONER PHILLIPS said, he had carefully considered the act of Parliament, and he was of opinion that the objection made to the insolvent was not tenable. Under the 1 & 2 Vict. c. 110. the legislature had specifically mentioned the vexatious defence to an action as a cause of opposition to an insolvent's discharge; but no similar ground of objection to an insolvent under the protection statute was anywhere mentioned; he was, therefore, bound to presume that the legislature did not intend that such an objection should prevail, and a day would be named for the final order.

*Attorneys, Jeffreys ; and Preston.*

COURT OF  
 BANKRUPTCY.  
*July 6.*

A trader adjudged bankrupt upon his own petition. It appearing that his estate was insufficient to pay 5s. in the pound after payment of all expenses, a condition was annexed to the certificate, charging all future acquired estate with the deficit. No proceedings to be taken in regard to such estate without leave of the Court.

## IN RE JOSEPH BOYS. (a)

Before MR. COMMISSIONER FONBLANQUE.

IN this matter Boys was adjudicated bankrupt upon his own petition under the 93rd section of the Bankrupt Law Consolidation Act. (b)

Mr. *Stansfeld*, the official assignee, had made the usual certificate of his belief of the sufficiency of the estate to pay 5s. in the pound clear of expenses. It appeared, however, that, after paying all expenses, a very small sum only would remain available for distribution among the creditors. Under these circumstances, the bankrupt applied for his certificate.

MR. COMMISSIONER FONBLANQUE granted a certificate as of the third class, with the condition annexed: "that the bankrupt's future acquired estate was not to be protected until he had paid 5s. in the pound to his creditors, in respect of this present bankruptcy; and that no proceedings should be taken against his future estate without leave of the Court."

*Solicitors, James ; and Braddon.*

(a) Reported by A. A. Doria, Esq.

(b) 12 & 13 Vict. c. 106. s. 93. By this section any trader, liable to become bankrupt, may petition for an adjudication against himself, provided that he make it appear to the

satisfaction of the Court that his available estate is sufficient to pay his creditors at least five shillings in the pound, clear of all charges of prosecuting the bankruptcy.

1853.

## ANONYMOUS. (a)

Before MR. COMMISSIONER EVANS.

COURT OF  
BANKRUPTCY.

June 30.

THE alleged debtor was summoned under sect. 78. of the act (b), to state whether he acknowledged or denied a debt, which the creditor claimed as due for goods sold and delivered. The affidavit of debt made by the creditor was sworn on the 27th of May, in the form prescribed by schedule F., except that the concluding allegation, as to the delivery of the particulars of demand, and notice requiring immediate payment, was omitted. There was a second affidavit sworn by the solicitor's clerk on the 30th of May, stating that the deponent on the 28th of May personally served the alleged debtor with a copy of the account and notice.

A trader debtor summons issued under sect. 78. of the Bankrupt Law Consolidation Act, 1849, is irregular, where the affidavit of debt, upon which the summons is founded, has been sworn before the delivery of the particulars of demand.

Mr. *Bagley*, on behalf of the party summoned, referred to sect. 78., and objected that the affidavit of debt appeared to have been sworn *before* the particulars of demand, and notice requiring payment had been delivered; whereas it was the manifest intention of the legislature that the particulars should be first delivered. The debtor should be called upon to pay before any proceeding was taken under the 78th section. Here, the first proceeding taken by the creditor was to file an affidavit of debt under the act. It was consistent with all that now appeared before the Court, that the debt might have been paid at

(a) Reported by A. A. Doria, Esq.

(b) 12 & 13 Vict. c. 106. This section enacts that if any creditor of any such trader shall file an affidavit in the court in the district in which such trader shall reside, in the form specified in schedule F. thereunto annexed of the truth of his debt, and of the debtor, as he verily believes, being such trader (i. e. subject to the bankrupt laws), and of the delivery to such trader personally, or to some adult inmate, at his usual or last known place of abode or business, of an account in writing of the particulars of his demand, with a notice thereunder requiring immediate payment thereof, in the form specified in schedule G. annexed to this act, it shall be lawful for the court, in which such affidavit shall be filed, to issue a summons in writing, calling upon such trader to appear before such court, and stating in such summons the purpose for which such trader is called upon to appear as thereinafter provided.

The form of affidavit required by schedule F. is as under:—

"A. B. and C. D., of —, severally make oath and say; and first this deponent A. B. for himself saith, that E. F. is justly and truly indebted to this deponent in the sum of —£ for, &c.; and this deponent further saith that the said E. F., as this deponent verily believes, is a trader within the meaning of the law of bankruptcy, and resides at —; and that an account in writing of the particulars of demand of the said A. B., amounting to the said sum of —£, with a notice thereunder written in the form prescribed by the Bankrupt Law Consolidation Act, 1849, requiring immediate payment of the said debt, is hereunto annexed; and this deponent, C. D., for himself saith that he did on the — day of — serve the said E. F. with a true copy of the said account and notice. Sworn, &c."

1853.  
 ANONYMOUS.  
 Statement.

the moment the particulars of demand were delivered. In that case the affidavit would have been true at the time it was filed, though it would not be true if made when the summons was issued. He also objected that the affidavit, the form of which was prescribed by schedule F., was a joint affidavit, and that the adoption of two several affidavits was irregular.

On the part of the creditor it was contended, that the requirements of the section referred to had been substantially complied with, and that it lay upon the debtor to show that the debt had been paid before the summons was issued.

Judgment.

MR. COMMISSIONER EVANS. I think the first objection is matter of substance. No such affidavit can be made under the authority of this act as the creditor has here made, until he has first caused the debtor to be served with a notice of his demand, and has required payment. It is possible, as suggested, that the debtor might have paid the debt when it was demanded, and no such affidavit could then truly be made. The irregularity is fatal.

Summons dismissed with costs.

Solicitors, *May*; and *Cragg & Jeyes*.

COURT OF  
 APPEAL.  
 June 24.

### EXPARTE THE ASSIGNEES OF BREWSTER AND WEST, IN RE BREWSTER. (a)

A. and B., partners, dissolved partnership, and gave notice thereof in the Gazette, and by circular, requiring the debts due to the firm to be paid to A., who afterwards became bankrupt. — Held, that these debts remained the property of the firm, although, as between the partners, it had been agreed that all the partnership assets should belong to A.

THIS was an appeal from the decision of Mr. Commissioner *Evans*, reported *ante*, p. 27.

Mr. *Follett* and Mr. *Lucas* appeared for the appellants, the assignees of Brewster and West.

Mr. *Swanston* and Mr. *Aspland* were for the assignees of Brewster.

In addition to the cases cited before the learned commissioner, the following were mentioned: *Exp. Cooper* (b), *Exp. Burton* (c), *Exp. Husband* (d), *Joy v. Campbell*. (e)

At the conclusion of the argument on behalf of Brewster's assignees, Lord Justice *Knight Bruce* said that the reply might be confined to the plant and stock in trade, and need not be addressed to the debts.

Mr. *Follett* was then heard in reply.

(a) Reported by G. S. Allnutt, Esq.

(b) 1 Mont. Dea. & D. 358.

(d) 1 G. & J. 358.

(c) 1 G. & J. 207.

(e) 1 Sch. & Lef. 328.

LORD JUSTICE KNIGHT BRUCE said, that with regard to so much of the appeal as referred to the debts due to Brewster and West, they were of opinion upon the evidence, that nothing had been done to take them out of the reputed ownership of the original creditors. If the advertisement and circular had come in sufficient time to the knowledge of the debtors, they would not of necessity have imported an assignment,—they would not of necessity have imported more than agency. The parol evidence was much too loose to enable the Court to come to any conclusion one way or the other. It appeared to his lordship that the case of notice to the debtors wholly failed. Whatever, therefore, might have been the agreement as to the debts between the creditors themselves, the section so frequently adverted to (a) rendered it necessary to treat them as part of the joint estate.

With regard to the plant and stock, his lordship was not without some degree of doubt, a doubt arising from the circumstance that he was not satisfied there was a complete delivery, and from the circumstance that there was not here a secret but an open, and avowed, and notorious partnership for a time, carrying on the business in the possession of the goods, of which his lordship was speaking, by one of the partners alone. But doubting as his lordship did upon this point, he could not say that he had a sufficiently strong opinion upon it to warrant him in dissenting from the conclusion of the learned commissioner; a conclusion that was very possibly correct. If he were satisfied in his own mind that the conclusion was wrong, he should be bound to declare it; but he was not so satisfied, and therefore could not give his voice for disturbing that part of the decision.

LORD JUSTICE TURNER. The question the Court was called upon to decide in this case was, whether in truth any concluded agreement was come to between these two partners upon the subject of the division of the partnership assets; whether they belonged to Brewster by the agreement of the 6th July. By that agreement, after reciting that the parties had mutually agreed to dissolve the partnership, and in pursuance of that had signed the notice, it was agreed that Brewster should have the premises for the remainder of the term, and pay and satisfy the rent and covenants, and that each of the parties should be at liberty to carry on the business of a printer, and that it should be referred to arbitration, to ascertain the value of the copartnership effects, and of the amount of the value of the share of West therein to the 30th of June, and to decide

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EX PARTE THE  
ASSIGNEES OF  
BREWSTER  
AND WEST, IN  
RE BREWSTER.  
*Judgment.*

(a) Sect. 125. of Bankruptcy Law Consolidation Act, 1849.

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 EXPARTE THE  
 ASSIGNEES OF  
 BREWSTER  
 AND WEST, IN  
 RE BREWSTER.  
*Judgment.*

what in respect of such share should be paid by Brewster, and how and when payment should be made, and in what manner the affairs should go on. That recital, carried into effect by the deed as it was, was to his lordship's mind convincing evidence that these parties had come to an agreement that Brewster should be sole owner of the property; and that when the deeds were executed, the sum to be paid by Brewster in respect of West's share, was to be determined by the arbitrator. When this conclusion on the subject of the deed between the parties was arrived at, there was this question as to the debts, what was there to take the debts out of the operation of the statute so as to alter the ownership? This debt belonging to the partners jointly must continue to belong to them jointly, except upon notice being given to the debtor that that debt, which was joint property, had become the sole property of the one. Now, there was nothing in the shape of such notice, except the fact, that authority had been given by both partners to the debtors to pay the amount of their debts to one of these partners. But a mere authority of that description, an authority given to the one to receive the debts, could not alter the property as between the two. His lordship therefore thought, that as to the debts there was not sufficient to take the case out of the operation of the statute, and to lead the Court to say this was not joint but separate property.

As to the plant and stock the case was different. There were these facts: on the 6th July, 1850, sole possession was taken by Brewster; he carried on the business; the name was changed; the separate trade was carried on by him; and the other partner was also carrying on a separate trade in another place. These facts were sufficient to bring the case within the doctrine of reputed ownership.

His lordship, therefore, thought that the decision of the commissioner must be affirmed as to the plant and stock, and altered as to the moneys which were due to the firm. Each estate must bear its own costs.

Solicitors, *Hubbard*; and *J. H. & J. Linklater*.



EXPARTE THE NATIONAL AND PROVINCIAL  
BANK OF ENGLAND, IN RE T. BURTON. (a)

1853.

Before MR. COMMISSIONER FONBLANQUE.

COURT OF  
BANKRUPTCY.

July 12.

THE bankrupt was a railway contractor. In December, 1848, a dividend was declared of 10s. in the pound, after payment of which, a sum of 2071*l.* 2s. 7*d.* remained in the hands of the official assignee. At the time of the bankruptcy, the bankrupt had overdrawn his account with the National and Provincial Bank to the amount of upwards of 4000*l.*, in respect of which the bank had, at the dividend meeting, entered a claim. The bank had also instituted proceedings in Chancery, in which, the bankrupt's assignees were joined as defendants, for the purpose of enforcing a written order or authority, given by the bankrupt, and which the bank contended amounted to an equitable assignment, to receive certain moneys due to them from the London and North Western Railway Company, upon his contract for a part of the company's line: pending these proceedings, an order was made in bankruptcy, reserving the dividend until the question should be decided.

By the decree in April, 1852, the bill in Chancery was dismissed, but without costs; and the costs of the assignees were ordered to be paid out of the estate.

In April of the present year, the claim on the part of the bank was turned into a proof for 4117*l.* 16s. 2*d.*, the dividend upon which amounted to 2058*l.* 18s. 1*d.*

The payment of this dividend being objected to by the assignees, Mr. Commissioner *Fonblanque* directed a case, embodying the above facts, to be submitted to him.

The assignees insisted that the costs incurred in Chancery had no priority, as regarded the balance in hand, over other general costs incurred in relation to the bankruptcy; that the balance in hand, which had since been greatly reduced, being insufficient to pay the costs of the suit in equity, they were entitled to be reimbursed out of the dividend payable to the bank; and that, otherwise, the decree would be rendered equivalent to a decree obliging them to pay the costs out of their own pocket.

For the bank it was contended, that the bill was dismissed without costs; and that, having substantiated their proof, they were entitled to the dividend. They referred to *Exparte Grant*. (b)

A creditor sought, by bill in equity, to establish a title by equitable assignment, as was contended, to moneys belonging to the bankrupt in the hands of a third party. The bill was dismissed without costs; but the costs of the assignees, who were made defendants, were ordered to be paid out of the bankrupt's estate. He afterwards proved for the debt. — *Held*, that the costs of the assignees should, on a deficiency of assets in their hands, be deducted out of the dividend coming to the creditor in the first instance.

*Statement.*

(a) Reported by A. A. Doria, Esq.

(b) Mont. &amp; M. 80.

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EXPARTE  
THE NATIONAL  
AND PRO-  
VINCIAL BANK  
OF ENGLAND,  
IN RE  
T. BURTON.  
*Judgment.*

MR. COMMISSIONER FONBLANQUE ordered the costs and charges of the assignees in the above suit to be taxed; and that a sum of 200*l.* should be retained out of the dividend of 2058*l.* 18*s.* 1*d.* coming to the bank, for the payment of such costs and charges; and that the residue of the said sum of 2058*l.* 18*s.* 1*d.*, and of the 200*l.* (if any) after payment of such taxed costs and charges, should be paid over to the bank.

Solicitors, *Wilde, Rees, Humphry & Wilde*; and *H. Lloyd*.

### EXPARTE COLLINET, IN RE WINTER. (a)

COURT OF  
BANKRUPTCY.

Before MR. COMMISSIONER HOLROYD.

July 21.

An assistant master in a school, at a fixed salary, is within sect. 168. of the Bankrupt Law Consolidation Act, 1849.

*Argument.*

MR. COLLINET was engaged as French teacher in the bankrupt's school, at Brighton, and it was in respect of his first quarter's salary that the application was made.

Mr. *Lawrance* (solicitor) appeared for Mr. Collinet, and referred to sect. 168. of the Bankrupt Consolidation Act. (b) He contended that the apparent intention of the legislature was to include in this section all clerks and assistants, who were engaged at fixed salaries.

*Judgment.*

MR. COMMISSIONER HOLROYD. This section has been held to extend to a person engaged as a traveller (c); and to the mate of a vessel (d) hired by the master at certain wages, on the ground of their being assistants. I think a teacher in a school may also be included as an assistant to the master in his business, and in this view Mr. Collinet will be entitled.

Ordered accordingly.

Solicitors, *Lawrance, Plews & Boyer*; and *Sowton*.

(a) Reported by A. A. Doria, Esq.

(b) 12 & 13 Vict. c. 106. s. 168. This section provides that when any bankrupt shall have been indebted at the time of filing the petition for adjudication to any servant, or clerk of such bankrupt, in respect of salary or wages, it shall be lawful for the Court, upon proof thereof, to order so much as shall be so due,

not exceeding three months' wages or salary, and not exceeding thirty pounds, to be paid to such servant or clerk out of the estate of such bankrupt.

(c) *Exparte Neal*, Mont. & M. 194.

(d) *Exparte Homberg*, 2 Mont. D. & D. 642.

## EXPARTE PHILLIPS v. PHILLIPS. (a)

THIS was the petition of Phillips, a trader, by way of appeal from the decision of Mr. Commissioner *Goulburn*, on the 11th of June last. (b) The object of it was to have the petition for arrangement, which had been presented by the petitioner under the Bankrupt Law Consolidation Act, 1849, and the order thereon dismissed or annulled. All the creditors consented, and the official assignee had been served, but did not appear.

Mr. *Bagley*, in support of the petition, referred to the 221st and 223rd sections of the act, within the latter of which it was admitted that the case did not come.

Their Lordships considered that they had jurisdiction in the matter, and made the order.

Solicitors, *Lawrance, Plews, & Boyer*.

(a) Reported by G. S. Allnutt, Esq.

(b) See *anté*, p. 46.

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July 4.

Petition for arrangement dismissed, and order thereon annulled upon the application of the trader, the creditors consenting, although the case was not within the terms of the 223rd sect. of the 12 & 13 Vict. c. 106.

## EXPARTE THE ASSIGNEES OF PLIMMER, IN RE PLIMMER. (c)

Before MR. COMMISSIONER HOLROYD.

THE petition in this case prayed that a moiety of a sum of stock, to which the bankrupt was entitled under an assignment, might be sold for the benefit of his estate, under the following circumstances: Abraham Peacock, in right of Isabella his wife, as legatee under a will, was entitled to a reversionary interest in a moiety of 1046*l.* new 3*l.* 10*s.* per cent. Consolidated Bank Annuities, expectant on the death of Edward Coton, the tenant for life. The stock was standing in the name of George Taylor, and was held by him upon the trusts of the will, one of which was, that upon the death of Coton, the trustee should sell and divide the proceeds between Elizabeth Coxon and Isabella Coxon in equal shares. Isabella, on the death of her first husband, married Peacock, and died about six years ago, leaving her husband, who still survives. Plimmer purchased the share of Peacock and his wife, and the same was assigned to

(c) Reported by A. A. Doria, Esq.

COURT OF  
BANKRUPTCY.  
June 15, and  
July 27.

*Semble.* This Court ought not to make an order for sale under the 125th section of the Bankrupt Law Consolidation Act, 1849, upon an *ex-parte* application; and that the Court should not entertain an *ex-parte* application for the order.

The bankrupt, being the assignee of the reversion of a sum of stock, in 1846 assigned to A., but no notice was given to the trustee of

such assignment: the tenant for life died subsequent to the bankruptcy, which took place in March 1853. *Held*, that the stock was goods and chattels within the meaning of the 125th sect. of the Act, and that, at the time of the bankruptcy, it was in the order and disposition of the bankrupt as reputed owner thereof, with the consent of the true owner, and consequently passed to his assignees.

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him in November, 1840. Notice in writing of this assignment was given to the trustee. In May, 1846, Plimmer assigned this moiety, expectant on the death of Coton, to Battcock, by way of mortgage, as a collateral security; but no notice of this last assignment was given to the trustee. Battcock died in 1847, whereupon his interest became vested in his executors, as assignees in law, but no notice of the assignment to Battcock was given to the trustee by, or on behalf, of such executors. Plimmer was adjudicated bankrupt on the 2nd of March, 1853, and the present petitioners were appointed assignees. Subsequently, Edward Coton had died, and the assignees now claimed to be entitled to an absolute vested interest in possession in the moiety of the stock so assigned by Peacock and his wife to the bankrupt.

Mr. *Surrage* for the Assignees, contended, that Battcock having given no notice to the trustee, in whose name the stock was standing, of the assignment to him, the bankrupt must be taken to have had the order and disposition of the fund as the reputed owner. The question was, what was the position of the parties at the time, not of the assignment, but of the bankruptcy, at which time alone, the rights of the parties are to be ascertained? At the time of the bankruptcy, it was a reversionary interest, to which the bankrupt became entitled absolutely on the death of the tenant for life. The circumstance of Peacock being alive at this time, is immaterial. The trustee remained the trustee of the bankrupt, and Battcock by omitting to give notice of his assignment, did not convert him into a trustee for himself; his title, therefore, is incomplete. *Dearle v. Hall*. (a) If the assignee do not give notice, it is a proof of fraud, and of ownership in the other party. The bankrupt then, being substantially entitled, was the owner under clause 125. of the Bankrupt Law Consolidation Act, (b), and the trustee could not have withheld the fund from him. The circumstance of the bankrupt being an assignee, and not the original legatee, cannot alter the case: a well-advised trustee would have required the assignment to be produced before parting with the money.

The words "*goods and chattels*" in sect. 125. comprehend *choses in action*. *Brown v. Bellares*, (c) *Ryall v. Rowles*, (d) *Dearle v. Hall*, (e) *Loveridge v. Cooper*. (f) These words were introduced into the bankrupt laws in the time of James, (g)

(a) 3 Russ. 1.

(b) 12 & 13 Vict. c. 106.

(c) 5 Madd. 53.

(d) 1 Vcs. 348.

(e) 3 Russ. 1.

(f) Ibid.

(g) 1 Jac. I. c. 15. s. 5.

and have ever since been retained. Policies of assurance, bond and simple contract debts have been held as included in these words.

Mr. *Southgate contra*. This does not come within the meaning of "*goods and chattels*" in the 125th section; but if it be within these words, it was not in the reputed ownership of the bankrupt. The first point has never been decided. The purchase conferred a mere right to call upon the trustee for an account: all that vested was the chance of receiving a sum of money on certain contingent events. The reason why *choses in action* have been held to be within the bankrupt laws, is, that there was always a bond, or some other personal security to perfect the title. This is shown in *Ryall v. Rowles*. In *Smith v. Smith* (a), a much stronger case, the point was left undecided.

On the second point, the bankrupt was not the original legatee: he claims only under an assignment, without which the trustee will not transfer the funds. *Jones v. Gibbon*. (b) If Plimmer had been the original legatee, the doctrine of notice here contended for would apply; but being assignee only, he could give no title. The cases of *Dearle v. Hall* and *Loveridge v. Cooper* do not apply, if this comes within the 125th section; which, I contend, it does not. Notice is essential only as between incumbrancers where the assignment is complete. *Ex parte Newton* (c) was similar to this case.

Mr. *Surrage*, in reply, distinguished the cases of *Smith v. Smith* and *Ex parte Newton* from the present case.

MR. COMMISSIONER HOLROYD. I must go through the cases, but I do not at present see any difference between this case and that of other *choses in action*.

His Honour now delivered judgment as follows:—

This was a petition under the 125th sect. of the Bankrupt Law Consolidation Act (d), for an order to sell a portion of certain stock standing in the name of a trustee, and which it was said the bankrupt, at the time of his bankruptcy had, by the consent and permission of the true owner thereof, in his order and disposition as reputed owner. The facts upon which the order is prayed are fully set forth in the petition; but, before I enter upon the merits of the petition, I will make a few observations on the mode of proceeding under the 125th sect., and on the effect of the order thereupon.

The intention of the Legislature, as disclosed by the preamble

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(a) 2 Cr. & M. 231.; 4 Tyrr. 52.  
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(c) 2 Mont. & A. 51.

(b) 9 Ves. 407.

(d) 12 & 13 Vict. c. 106

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of the Bankrupt Law Consolidation Act, was to *amend* as well as to consolidate the laws relating to Bankruptcy; and the act contains some enactments which are entirely new, and some which are new in part, whilst others are merely re-enacted. Now, although an act of Parliament may be construed with reference to the previous state of the law, and any re-enactments may be understood in the same sense as they were before (unless, indeed, the context may require a different interpretation), the general rule is that, when an act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed; and we must not destroy that by indulging in conjectures as to the intention of the Legislature. See per Lord Tenterden in *Surtees v. Ellison* (a), and *Kay v. Goodwin* (b), *Barrow v. Arnaud* (c), *Steavenson v. Oliver* (d), and *Simpson v. Ready* (e).

Moreover, as the Legislature, when it passed the Bankrupt Law Consolidation Act, must be taken to have had in its mind the very acts it was repealing, it should be concluded that any re-enactments in altered phraseology were made by design; see per Lord Tenterden in *The King v. Inhabitants of Bentley* (f). And considering the entire report on the old law of bankruptcy, and the important alterations by the new Act, both in the law and the jurisdiction for its administration, I think it may be said with reference to the Bankrupt Law Consolidation Act, as Lord Tenterden, in *Surtees v. Ellison*, said of the former bankrupt Act (g), "We are, therefore, to look at the statute as if it were the first that had ever been passed on the subject of bankruptcy." We find, then, by the Bankrupt Law Consolidation Act, that the former bankrupt Act (g) is thereby absolutely repealed, except in so far as it repealed any former Act; that the Act for the amendment of the law of bankruptcy (h) is also wholly repealed with the like exception, and also except as to appointments and salaries of commissioners and other officers; that the Court of Bankruptcy, which had been established under a previous act (i), is continued as a Court of Law and Equity for the purposes of the new Act; and that it is a Court of Record, and is put on the same footing, in regard to powers, rights, incidents, and privileges, with Her Majesty's Courts of Law and Judges at Westminster. With respect to the general jurisdiction of the Court, it is (k), "in the exercise of its primary jurisdiction, to have superintendence and control in all matters of bankruptcy, and

(a) 9 B. & C. 750.

(b) 6 Bing. 582.

(c) 8 Q. B. Rep. 603. 606.

(d) 8 M. & W. 241.

(e) 11 M. & W. 346.

(f) 10 B. & C. 526.

(g) 6 G. 4. c. 16.

(h) 5 & 6 Vict. c. 122.

(i) 1 & 2 W. 4. c. 56.

(k) 12 & 13 Vict. c. 106. s. 12.

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to hear, determine, and make order in any matter of bankruptcy whatever, so far as the assignees are concerned, relating to the disposition of the estate of the bankrupt, or of any estate taken under the bankruptcy and claimed by them for the benefit of the creditors, or relating to any acts done or sought to be done by the assignees in their character of assignees by virtue or under colour of the bankruptcy; and also in any matter of bankruptcy as between them and any creditor or other person appearing and submitting to the jurisdiction of the Court; and also in any application for a certificate of conformity, and in *any other matter* (whether in bankruptcy or not) where the Court, by virtue of the act, has jurisdiction over the subject of the petition or application, save and except as may be otherwise specially provided, and subject in all cases to an appeal to one of the Vice-chancellors (since transferred to the Lords Justices); and if no appeal be entered within twenty-one days from the date of any decision or order, and be thereafter duly prosecuted, every such decision or order is to be final." Then certain special powers are given to the Court with respect to proceedings before, and as to the adjudication of bankruptcy, and for securing the property and surrender of the bankrupt, together with full powers of examination for obtaining information material to the full disclosure of all the bankrupt's dealings, and of deciding on all proofs and claims against his estate; and it is provided that when a person has been adjudged a bankrupt, all his personal estate and effects shall vest in the assignees by virtue of their appointment. Then, in reference to the consequences of the adjudication in certain cases, the provision in question follows with others of like import, and they commence with this important heading, "With respect to the power of the Court over certain descriptions of property;" and it is then enacted: "If any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition, any goods or chattels whereof he was reputed owner, or whereof he had taken upon him the sale, alteration, or disposition as owner, the Court shall have power to order the same to be sold and disposed of for the benefit of the creditors under the bankruptcy;" (a) and a proviso is engrafted on this enactment that nothing therein contained shall invalidate or affect mortgages or assignments of ships duly registered. By the two following sections a like power is given to the Court over lands and goods previously transferred by the bankrupt (except upon marriage or other

(a) 12 &amp; 13 Vict. c. 106. s. 125.

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valuable consideration), to any of his children, or any other person, when he was insolvent (a), and over property of the bankrupt extended by a fraudulent extent (b); by sect. 126. "every such sale shall be valid against the bankrupt, and such children and persons, and against all persons claiming under him;" and by sect. 127. the Court may examine upon oath whether the debt was due to the pretended debtor, or accountant upon any contract originally made between the accountant and the bankrupt; and if such contract was originally made with any other person than the said debtor or accountant, the court may order the property to be sold for the benefit of the creditors under the bankruptcy, and "such sale shall be valid against the extent, and all persons claiming under it, and any person, to whom the property shall be sold, or assigned by the Court, shall and may recover the same against any person, who shall detain the same."

By sect. 266. an express power is given to the Court for compelling obedience to any rule, or order of the Court duly made for enforcing any of the purposes or provisions of the Act: and I may here add that, in statutes, incidents are always supplied by intendment: whenever a power is given by a statute, everything necessary to the making it effectual is given by implication.

Now, I take it to be settled in *Heslop v. Baker* (c), which was acquiesced in by the Lords Justices in *Ex parte Barlow, In re Marygold* (d), and by the Court of Common Pleas in *Quartermaine v. Bittlestone* (e), that it is the bankrupt's own property only that passes by the adjudication; and that in the case of goods and chattels in his reputed ownership, the Court of Bankruptcy must make an order to sell and dispose of the same, in order to vest the property in the assignees, or some other person. But in consequence of a recent decision, and doubts which have been entertained, the question arises, how is this order to be obtained? Is it to be granted on an *ex parte* application, and in the absence of the party who is to be affected by it? Looking at the provision in sect. 125. as the first enactment ever passed respecting reputed ownership (and, in the form in which it now stands on the statute book, it really is so), I think it would be deemed a hard and unreasonable construction if it were held, that the assignees of a bankrupt were thereby enabled on a *prima facie* case of reputed ownership, and on an *ex parte* application, to obtain the sanction of a court of justice to sell the property of another man; more

(a) 12 & 13 Vict. c. 106. s. 126.

(b) S. 127.

(c) 6 Exch. R. 740.

(d) 22 L. J. (N. S.) 15. Bank.

(e) 22 L. J. (N. S.) 105. C. P.



especially when it is considered that the Court, to which the application is required to be made, is invested, by express words, with the most ample powers of examination and enquiry, and for compelling the attendance of parties as witnesses, and for enforcing the rules and orders duly made by the Court; and further, that the Court (a) is to hear, determine, and make order, not only in any matter of bankruptcy between the assignees and any other person appearing, and submitting to the jurisdiction of the Court, but also in any other matter, (whether in bankruptcy or not,) where the Court, by virtue of the Act, has jurisdiction over the subject of the petition or application, except as may be by the Act otherwise specially provided. I cannot bring my mind to the conclusion that such a course ought to be followed, unless the statute imperatively requires it. Now, it will be observed that, by sect. 127. the Court must first examine upon oath as to the debt due to the accountant, before it can make the order; and that sections 126. and 127. contain positive words, stating against what persons the sale shall be valid; and whilst the proviso to sect. 125. contains negative words, stating what the enactment shall not invalidate, the 127th section gives a right of action to the vendee or assignee of the property against any person who shall detain the same. Taking all these clauses together, as the Court of Exchequer did in *Heslop v. Baker*, and not imputing to the Legislature inconsistent intents upon the same general subject matter, namely, "the power of the Court over certain descriptions of property," but considering that, what it has clearly said in one section is the best evidence of what it intended to say in the others (b), especially if the words used in each may fairly bear the like construction, it appears to me, on the best consideration which I can give to the 125th section, having regard also to sect. 12., and construing the words of the statute in their plain and ordinary import, that, whether a case be one of reputed ownership or not, is a fact on which the Court is to decide; and I think that the Court must be satisfied upon this fact, before it can be called upon to make the order. But how can the Court properly inform itself of the fact, but by the examination of witnesses, and by summoning, and hearing the party most interested in the question, namely, the true owner of the property about to be dealt with, who alone may have the means of giving the requisite information? There are no words in the Act of Parliament pointing to an exclusion of the true owner and his witnesses from being heard, or to prevent the Court from sum-

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(a) 12 & 13 Vict. c. 106. s. 12.

(b) Coleridge J., observations in *Rex v. St. Pancras*, 6 A. & E. 7.

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moning either him or them, and nothing, I think, which expressly or impliedly gives an authority to act, without giving the party interested a fair opportunity of being heard. The exercise of this power, then, as it seems to me, is a judicial, and not a ministerial duty; and, if judicial, the Court cannot make the order without determining some point, and that should, I think, be upon hearing the parties. In the case of *Capel v. Child* (a), which was recognised and referred to by *Parke B.*, in delivering the judgment of the Court of Exchequer Chamber in the late case of *Bonaker v. Evans* (b), *Bayley B.* says, "He knows of no case, in which you are to have a judicial proceeding, by which a man is to be deprived of any part of his property without his having an opportunity of being heard;" and in *Bonaker v. Evans* (b), *Parke B.* says, "That case (*Capel v. Child*) was a very strong one, and shows how firmly the Court adheres to that great principle of justice, that in every judicial proceeding, *qui aliquid statuerit, parte inaudita altera, æquum licet statuerit, non æquus fuerit.*" The general principle followed in this and other cases, is, that before a judicial act is done, by which a party is to be affected in his person or property, or by which his interest is to be in some way affected, both sides should be heard. See also *Painter v. The Liverpool Gas Co.* (c), and *The Queen v. Totnes Union.* (d)

There is one case, *In re Hammersmith Rent Charge* (e), in which it was held by three judges (*Parke B. dissentiente*), that an order to summon a jury to assess the arrears of a rent charge apportioned on certain lands under the Tithe Commutation Act (f), the rent charge being in arrear, and no sufficient distress on the premises liable to the payment thereof, might be made on an *ex parte* application to the Judge; but in that case, the Judges, who so held, admitted that the case of *Capel v. Child* was to some extent in principle and authority against the order, but their Lordships thought that, with reference to the object of the Act, it was the only construction they could give it, and that from the protection expressly given by the Act to the party to be affected by it, no injustice could be done. The party was entitled by the Act to have a certain number of days' notice of the order, and with liberty to apply to have it set aside. *Alderson B.* said, "He cannot be punished without an opportunity of being heard." But in a case of alleged reputed ownership, the Commissioners' order under the statute for the sale of the property for the benefit

(a) 2 Cr. & T. 558.; 2 Tyrr. 689.  
 S. C.

(b) 16 Q. B. R. 171., in which the principal cases are cited.

(c) 3 A. & E. 433.

(d) 7 Q. B. R. 698, 699.

(e) 4 Exch. R. 87.

(f) 6 & 7 W. 4. c. 71. ss. 82. 85.

of creditors, if it be made on an *ex parte* application, not only affords no opportunity to the true owner of the property to come in before the Court, and show cause against the sale, but the true owner may have no notice of the order, and he cannot apply to set it aside, nor can he prevent the sale from being made, except so far as a notice of his title might have that effect, or by an unseemly and forcible resistance to a sale, which has been ordered by a Court of competent jurisdiction, or possibly, by application to a Court of Equity for an injunction, which, moreover, if acceded to, would be on the principle of preserving the property until a legal decision on the rights could be obtained, and would not, therefore, be granted without some provision being made for putting the question in a course of legal investigation. It may therefore be said that, however unjustifiable the sale may be, the only remedy for the true owner is by an action at law, and the order for sale being the first step towards the forfeiture, or loss of his property, it must, I think, be considered to operate *in pœnam*: and, as injustice may thus be done if the proceeding be *ex parte*, I think it should not be allowed, but that both sides should be heard before any order is made.

Having considered the case upon general principles, I have now to consider, whether the Court is concluded by express authority, from dealing with a petition under the 125th section on an *ex parte* application. In the case of *Heslop v. Baker, Parke B.*, in delivering the judgment of the Court of Exchequer, said, "If the Court makes the order to sell, or vest in the assignees, a question may arise, whether that will be final and conclusive by virtue of prior sections, in cases where the claimant of the goods does not petition under sect. 12., and consequently not to be questioned in a court of law." I rather collect from this, that the Court of Exchequer was inclined to consider that the application for the order of sale should be made on hearing both sides. In a more recent case *Ex parte Barlow, In re Marygold(a)*, the Lords Justices intimated an opinion, that an order, under the 125th section, should be made on an *ex parte* application: their Lordships thought that the mortgagee of the goods in that case ought not to have been served at all, and that the proper course for the assignees would have been to appeal at once from the refusal of the Commissioner to make the order *ex parte*; but the point does not appear from the argument to have undergone much discussion. In *Quartermaine v. Bittlestone(b)*, in which it was held that the order must be specific as to the goods to which it is to apply, *Jervis C. J.* said, "I am inclined to think

(a) *Ubi supra*.(b) *Ubi supra*.

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in accordance with the decision of the Lords Justices, who resolved a doubt thrown out by my Brother *Parke*, that an *ex parte* order is sufficient for the purpose." In another part of his Lordship's judgment, he said, "It must be upon petition, or an *ex parte* application, possibly, according to the decision of the Lords Justices;" and *Maule J.* said, "I think the true object of the Act was that the Commissioner of the Court of Bankruptcy should have an opportunity (*ex parte, indeed, as held by the Lords Justices*, but still have an opportunity) of deciding on all the matters, which the assignees would have to prove before a jury, in order to entitle them to take away the property from the person, whose property it was." He also said, "Now, I observe the order is something like, and has some sort of analogy to, the finding of a bill by a grand jury, the object of which is, that before a person's liberty be affected, or he shall be tried for a supposed offence, a *prima facie* case must be made to a competent tribunal, to show, that he is a person, in respect of whom a case exists, that is fit to be tried by a jury." But making an order for the sale of the property, and under which a sale may at once be made, seems to be going much beyond the merely putting an accusation or charge in a course for further enquiry, like the finding of a bill by a grand jury. Is it not more like a case where the Legislature has thought fit to entrust the original, and it may be the final jurisdiction on the merits, to the Court below, subject to appeal?

However, the main point as to the form of the application, whether to be *ex parte* or not, is at least regarded with doubt by the Court of Exchequer, and the Lord Chief Justice of the Common Pleas. Still, if the validity of my order could not come in question in any other court than that of the Lords Justices, I should have felt bound by the decision of their Lordships in *Ex parte Barlow* above cited: but as this is not the case, and having regard to the doubt, under which the question has been left by two of the Courts of Common Law (the Common Pleas and Exchequer), and considering, that as yet the Court of Queen's Bench has not been called upon to give an opinion upon the point, and further remembering, that where a special statutory power is exercised, the person who acts must take care to bring himself within the terms of the statute,—that every thing, that gives jurisdiction, must appear in the order,—that, as *Coleridge J.* said in *Christie v. Unwin* (a), whether an order be made by the Lord Chancellor or a justice of the peace, the facts which give the authority must be stated; and see *Rex v. Croke* (b); and bearing in mind also that a judge, in exercis-

(a) 11 A. & E. 373.

(b) Cowp. R. 26.

ing a special statutory jurisdiction, may render himself liable to an action, if he make an order not within the scope of the jurisdiction so given to him (*Watson v. Boydell* (a)), I feel bound, in the discharge of my duty, but with the greatest deference and respect to higher authority, to declare the opinion I have formed; which is, that upon principle, and adverting to the words of the statute, the Court ought not to make an order for sale under the 125th section upon an *ex parte* application; and that, at all events, until the question has received a more solemn decision, the safer and more prudent course will be, that the Court should not entertain an *ex parte* application for the order.

If, indeed, it should be held, that the Court is authorised by the statute to make the order *ex parte*, as there is nothing in the act to make it obligatory so to proceed, it must, I think, still rest with the judicial discretion of the Court to determine whether it should grant the order without summoning the party to be affected by it, and in the exercise of that discretion, I cannot but think, that the Court would act rightly in not so granting it. It seems to be the opinion of the judges in the following cases, that the principle ought to prevail, though the Act may not require its adoption. See the observations of Lord Denman Chief Justice, and Patteson J., in *Rex v. Hughes* (b), and *Painter v. Liverpool Gas Co.* (c), *Reg. v. Totnes Union.* (d)

But, assuming that the order for sale should be made on an *ex parte* application, and without summoning the true owner of the property, a further and most important question will arise upon the effect of such an order; and upon which I will say a few words, for the information and guidance of assignees of bankrupts' estates. It may perhaps be urged that, by the words of the 125th sect., the fact itself of reputed ownership is made the condition precedent to the power of making the order of sale; but it appears to me that, whether there existed reputed ownership or not, was a fact on which the Legislature intended the Court to decide, for the Court must satisfy itself of the fact of reputed ownership to give it jurisdiction. Thus in the case *In re Clarke* (e), Lord Denman, speaking of an order made by the Master of the Rolls, said, "The adjudication of any competent authority deciding on facts, which are necessary to give it jurisdiction, is sufficient. Here we are concluded by his decision on the fact necessary to this decision, giving the same credit to him that we should to the humblest minister of the law; as *Richardson J.* said, in *Brittain v.*

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(a) 14 M. &amp; W. 57.

(b) 3 A. &amp; E. 425.

(c) *Ubi supra.*(d) *Ubi supra.*

(e) 2 Q. B. R. 634.

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*Kennaird*(a), "that when a magistrate having jurisdiction, found a particular vessel to be a boat within the statute on which he convicted, that was conclusive, so here, when the Master of the Rolls pronounces the place, at which the prisoner comes before him, to be the bar of his court, that is an adjudication which we must credit and hold conclusive;" and *Patteson* J. said, "every order must show facts sufficient to give a jurisdiction; but the facts, if so shown, are not to be contested;" and again, in delivering the judgment of the Court in *Thompson v. Ingham*(b), he said, "The law on this subject, so far as regards the analogous case of magistrates' convictions, was fully discussed in *Reg. v. Bolton*(c), and it was there held, that where the charge is such as, if true, is within the magistrate's jurisdiction, the finding of the facts afterwards by the magistrate is conclusive; but where the charge is not such as, if true, would be within the magistrate's jurisdiction, no finding of facts can alter it." See also *Aldridge v. Haines*(d), *Cave v. Mountain*(e), *Mould v. Williams*(f), *Reg. v. Inhabitants of Hickling*(g), and the observations of *Parke, B.* in *Boucher v. Evans*(h)

At present I have confined my attention to the words of the 125th section alone(i); but I think we may also call in aid the 12th section, by which the Court has power to hear, determine, and make order in (besides some matters which are first specified) any other matter (whether in bankruptcy or not) where the Court, by virtue of the act, has jurisdiction over the subject of the petition or application, save and except as may be by the act otherwise specially provided; subject in all cases to an appeal to the Lords Justices, with a proviso that if no appeal be entered within twenty-one days from the date of any decision or order of the Court, every such decision or order shall be final. Now, by sect. 125., the Court has jurisdiction over a petition, or application praying the Court to order or direct a sale of goods, being, at the time of the bankruptcy, in the order and disposition of the bankrupt as reputed owner, with the consent of the true owner; and it appears to me that, by sect. 12., the Court has jurisdiction to hear, determine, and make order in such petition or application, there being nothing in the Act otherwise specially providing; and if so, then, by the same section, the decision or order of the Court is to be final, subject only to appeal. And where a statute provides

(a) 1 Brod. & Bing. 432.

(b) 14 Q. B. R. 718.

(c) 1 Q. B. R. 66.

(d) 2 B. & A. 395.

(e) 1 M. & Gr. 262.

(f) 5 Q. B. R. 469.

(g) 7 Q. B. R. 880.

(h) 14 Q. B. R. 170.

(i) 12 & 13. Vict. c. 106

that the judgment of commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way. *Earl of Radnor v. Reeve* (a), and *Moody v. Thurston*. (b)

It seems to me, therefore, that the intention of the Legislature must have been, that an order of sale under sect. 125., made after hearing both sides, and adjudicating on the fact of reputed ownership, should be deemed conclusive, until reversed upon appeal; and that the judgment of the Court should be equally conclusive in favour of the true owner of the goods, if it found that such goods were not in the reputed ownership of the bankrupt within the meaning of the act. Now, let us for a moment consider the operation of such an order. Can it be predicted of it, that injustice or inconvenience is likely to arise? On the contrary, I think a great benefit; for the proceeding before the Court of Bankruptcy is simple, cheap, and expeditious; and whichever way the Commissioner decides, an appeal lies to one of the highest tribunals in the country, namely the Lords Justices; and the Lords Justices, if they think fit, may direct any question of fact arising before them to be decided by a jury; and, if necessary, a new trial may be moved for in the court, out of which the writ of summons issued. (c) Surely this mode of proceeding is far more satisfactory than to make an order authorising the assignees to sell the property of another person, and to leave the point as to the reputed ownership an open question, and, if contested, to be decided by a jury in an action, which may be brought at any time, possibly on justifiable grounds, or it may be by way of experiment, and after the assignees have sold the property and perhaps divided the proceeds. Again, there may be cases where, by the threat of an action hanging over the assignees, they are prevented from making a dividend, or winding up the bankrupt's estate. There may be other cases where the true owner wants his property, and not damages for the detention of it; but, although he may be advised that he has a right to it, yet, if the assignees have possession, and have obtained an order of sale, his only course is to bring an action, which may prove a very inefficient and inadequate remedy; and, in other cases, assignees may be driven to enforce their rights against the true owner at the risk of the costs of an action, and much consequent delay. Time and custom are great reconcilers; but I must say that, notwithstanding its long date (d), I have no lingering attachment to the old law of reputed

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(a) 2 Bos. & P. 391.

(b) 1 Stra. 481.

(c) 12 & 13 Vict. c. 106. s. 15.

(d) 21 Jac. 1. c. 19. (1624).

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ownership; for, though right in principle, I think it supplied a fruitful source for litigation; and in the mode of carrying out its provision, and more especially, so far as the true owner of the property was concerned, the law was harsh, and sometimes very unjust in its operation. I have already witnessed the advantage of the new law, administering it in the way in which I have construed it, and I think I may say, that the law has been so understood by all the Commissioners; but if orders for sale under sect. 125. are to be made on *ex parte* applications, and, instead of deciding anything, are to be regarded simply as a license to the assignees for litigation elsewhere, thus obliging parties in one court to resort to the aid of another, what otherwise might be an *useful amendment* in the law will, I think, become comparatively inefficacious. The Chancery Commissioners have lately (in their first Report) recorded their opinion of the importance of rendering each court competent to administer complete justice in the cases, which fall under its cognizance; and I do trust that, upon due consideration of the Bankrupt Law Consolidation Act, looking to the whole context, and endeavouring to give due weight to all its provisions, and yet scarcely enlarging, or restraining the literal interpretation of any particular part, it will be considered that the statute admits of the exposition, which I have ventured to give, and which, in my humble judgment, will operate beneficially for all parties, and give full effect to the remedy intended by the Legislature; at the same time being as it seems to me, in accordance with the plain policy of the bankrupt law, *festinum remedium*.

I will now dispose of the petition before the Court. (His Honour then, after stating the case as above, proceeded) — It was contended, on behalf of Battcock's executors, that the bankrupt was not the original legatee, and that the interest assigned by him to Battcock was not "*goods and chattels*" within the meaning of the 125th sect., and that, if goods and chattels, it was not in the order and disposition of the bankrupt, with the consent of the true owner.

As to the first objection, it was said that the same point had been raised in the case of *Smith v. Smith* (a), and left undecided. I have looked to that case, and the authorities cited, but find nothing which contravenes the doctrine established by the case of *Ryall v. Rowles* (b), and acted upon in the cases of *Dearle v. Hall* (c), and *Loveridge v. Cooper*, cited by Mr. Surridge, on the

(a) 4 Tyrr. 52.; 2 Cr. & M. 231. S. C.; 2 Tudor's Lead. Cas. in Eq. 537.  
 S. C.

(b) 1 Ves. 348.; 1 Atk. 165. (c) 3 Russ. 1. 48.



part of the assignees, and the long list of cases, which have been decided since, on the assignment of policies of assurance, shares in companies, and bond and simple contract debts, and in some cases too, of stock in the public funds: *Brown v. Bellasis* (a), *Ex parte Richardson* (b), *Hulton v. Sandys* (c), and *Etty v. Bridges* (d); that the term "goods and chattels" comprehends *choses in action*, and that the transfer of a *chose in action* is incomplete without notice to the legal holder of the fund, and that in bankruptcy, without such notice, where it might have been given, the property is in the reputed ownership of the bankrupt, with the consent of the true owner. In *Smith v. Smith*, as reported in Tyrr. and 2 Cr. & M., it is stated that the question whether the property came within the 72nd clause of the Bankrupt Act (e), was very elaborately argued: — the argument is not reported, but it appears from the report of the same case in the Law Journal (f) that it was contended, that the bankrupt's interest in the stock (it was a life interest in the dividends of stock standing in the name of a trustee), or his right to the accruing dividends, was not such a description of property as came within the meaning of the words "goods and chattels" in the 6 Geo. 4., c. 16 s. 72. The authority of *Ryall v. Rowles*, and other cases was admitted, as establishing the necessity of notice to the debtor or obligor, on the assignment of bonds, debts, or policies of assurance, where the assignor had the actual ownership of that, which he assumed to assign; and that in those instances, as well as where government stock stood in the name of the bankrupt, he might be deemed the visible owner; but it was denied that the doctrine had ever been extended to a mere equitable interest, such as the future dividends of stock standing in the name of a trustee. It was insisted *contrà*, that the bankrupt law made no distinction between legal and equitable interests; and that the rule, that when the delivery could not be made, the assignee must go as far as the nature of the subject would permit to perfect his title, applied equally in both cases, to stock and the dividends of stock standing in the name of trustees. The Court having disposed of the case upon the sufficiency of the notice, the *Lord Chief Baron* (Lord *Lyndhurst*), said it was unnecessary to consider the other question. In one of the late cases upon the subject, *Belcher v. Bellamy* (g), *Rolfe B.* said, "Were it not for the decisions, I should have thought it extremely doubtful,

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(a) 5 Madd. 53.

(b) Buck. 480.

(c) 1 Yo. 602.

(d) 2 Y. &amp; Coll. 486.

(e) 6 G. 4. c. 16. s. 72.

(f) 3 L. J. (N. S.) 42. Exch.

(g) 2 Exch. R. 311.

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whether a debt could be said to be left in the order and disposition of a bankrupt, with the consent of the true owner; but the doctrine in *Ryall v. Rowles* has prevailed so long, that we are bound by it; therefore, a person, purchasing a *chose in action*, is considered to leave it in the possession of the debtor, unless he is active and gives notice; although, if he takes every possible step to give notice, and the debt, nevertheless, remains in the bankrupt's possession, it does not so remain with the consent and permission of the purchaser. The Lord Chief Baron Pollock delivered a like opinion; but in *Jones v. Gibbons (a)*, where the doctrine is very explicitly laid down by Sir W. Grant, Master of the Rolls, his Honour refers with approval to the dictum of Sir J. Parker C. B., in *Ryall v. Rowles*, as to the necessity of notice to the debtor of an assignment, although he took a distinction between the assignment of a debt secured by a mortgage upon land, and other debts; and in *Ex parte Tennyson (b)*, Lord Lyndhurst, [after remarking that there is nothing in questions on the statute of James so much to be regarded, as the credit given to the trader on goods and chattels in his order and disposition,] speaking of debts, said "They may be the bulk of his capital in trade." The principle on which the rule in *Ryall v. Rowles* has been applied to debts and other *choses in action* has such high authoritative sanction, that the existing decisions on the subject are not likely to be disturbed.

Now, the present case differs somewhat in its circumstances from any hitherto decided; but the interest in question was clearly a *chose in action*, though wholly in contingency: it was the equitable reversionary interest of a married woman in certain stock, being a share in an ascertained fund, which was bought by the bankrupt, and assigned to him by the husband and wife. The right, then, which the bankrupt purchased, was not a present right: the effect of the assignment was to place him in the stead of the husband. Such right as the husband had, was transferred to the bankrupt, and that was a contingent right, depending on the event of the husband surviving his wife, or of the reversionary *chose in action* falling into possession during the coverture. If the wife had survived her husband, and the tenant for life, she would have become absolutely entitled to the reversionary interest, which was left to her, expectant upon the death of Coton, but she having died about six years ago, and leaving her husband surviving, and the husband and wife having assigned their interest to the bankrupt, the interest, which otherwise, on the death of the wife would have vested in

(a) 9 Ves. 410.

(b) Mont. & Bl. 78.

the husband *jure mariti*, (*Purdew v. Jackson* (a), *Honner v. Morton* (b), *Stiffe v. Everitt* (c)), and the elaborate discussion on the judgment of Lord St. Leonards, when Lord Chancellor of Ireland, in *Box v. Jackson* (d), and *Drewe v. Long* (e), became vested in the bankrupt; the assignment, as between the parties, having put the assignee in the same situation as the husband. *Hornsby v. Lee*. (f) The bankrupt, then, having done all he could to complete his title *in rem*, by giving notice to the trustee of the assignment to him, became both the real and reputed owner thereof. The second assignment effected a change of property, and the bankrupt was not then the real owner; but no notice of that assignment having been given to the trustee, either by, or on behalf of Battcock in his lifetime, or by, or on behalf of his executors after his decease, the bankrupt still continued the reputed owner; and there being, in fact, nothing beyond the simple act of assignment, and a reasonable time having elapsed, long before the bankruptcy, for the executors to complete their title, if they had been so minded, it must be presumed that they consented to the property in question continuing, down to the period of the bankruptcy, in the order and disposition of the bankrupt as the reputed owner thereof. *Fox v. Fisher* (g), *In re Thomas* (h), and *West v. Reid*. (i) And in considering the question of the necessity of notice to take a case out of the section, as to order and disposition, in like manner, as in questions between incumbrancers as to priority of title, no distinction can, I think, be made between legal and equitable interests, or between an interest which is vested or contingent, present or reversionary. If the interest be a personal chattel, whether a *chose in action* or a chattel reduced into possession, it comes within the term "*goods and chattels*." In addition to the cases of *Dearle v. Hall* and *Loveridge v. Cooper* on this point, see *Exp. Arkwright* (k), *Exp. Timpson and Ramsbottom* (l), *Foster v. Cockerell* (m), *Etty v. Bridges* (n), *Meux v. Bell* (o), *Jones v. Jones* (p), *Wiltshire v. Rabbits* (q), and *Wilmot v. Pike* (r). The three cases lastly above cited are authorities against the application of the rule as to notice in cases of an equitable interest in land, but they recognise the rule, as applicable to a mere equitable interest in the nature of a *chose in action*; and in the

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- (a) 1 Russ. 1.
- (b) 3 Russ. 65.
- (c) 1 M. & Cr. 37.
- (d) 1 Drury, 48.
- (e) 1 Eq. R. 58.
- (f) 2 Madd. 20.
- (g) 3 B. & Ald. 135.
- (h) 3 M. D. & D. 40.
- (i) 2 Hare, 249.]

- (k) 3 M. D. & D. 129. 143.
- (l) 2 Keen, 36.
- (m) 3 Cl. & Fin. 457.
- (n) 2 Y. & Coll. 486.
- (o) 1 Hare, 73.
- (p) 8 Sim. 633.
- (q) 14 Sim. 76.
- (r) 5 Hare, 14.

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last case of *Wilmot v. Pike*, Vice-Chancellor *Wigram*, in speaking of the judgment of Sir *T. Plumer* in *Dearle v. Hall*, says that it is impossible to read his very elaborate arguments in *Dearle v. Hall* and *Loveridge v. Cooper*, without seeing that his opinion as to the mode of transferring an equitable interest in property, not capable of actual delivery, was borrowed entirely from the decisions in bankruptcy, as to the acts, which were necessary under the statute to take a *chase in action* out of the order and disposition of a bankrupt. I think, therefore, this case is within the words of the 125th section of the Bankrupt Law Consolidation Act, and that I am bound to make the order prayed for by the assignees. I should add that, since this petition was heard, I have been informed by the solicitors for the respective parties, that the respondents are desirous of submitting to the jurisdiction of the Court.

Solicitors, *Lawrance, Plews & Boyer*; and *Kettle & White*.

COURT FOR  
 RELIEF OF  
 INSOLVENT  
 DEBTORS.

Sept. 21.

Where an insolvent, a director of an abortive gold mining company, had been described in the prospectus, by mistake, as of "Sydenham," his real residence being Lacey Terrace, Newington; and where the offices of a friend had been used as an address for business and other letters: *Held*, that he must describe himself as of both places, and must re-advertise.

## RE WILLIAM DUNBAR.(a)

Before MR. COMMISSIONER MURPHY.

THE insolvent had petitioned the Court under 1 & 2 Vict. c. 110., and now applied for his discharge. It appeared that for three years preceding his insolvency he had carried on the business of a coal dealer. He had never rented offices for the purposes of business, but, during a short interval, he had used those of a friend in Threadneedle Street, as a place of address for business and other letters. During the year 1852 he had accepted the office of a director in an Australian gold mining company, which subsequently proved abortive. In the prospectus he had been described as of Sydenham, his real residence being Lacey Terrace, Newington. He had perceived the error in the description, and noticed it to the solicitor to the company, but it had been permitted to remain unrectified.

Mr. *Reed* objected that the insolvent was not sufficiently described. He had held himself out to the world, by the publication of the prospectus, as of Sydenham, and therefore must describe himself accordingly. It mattered not that the mistake was attributable to the error of another party: the insolvent had permitted it to continue uncontradicted, and he was responsible. As to the office in Threadneedle Street, it was as much a place of business to the insolvent, as it was to his friend who paid the rent; and that address must be inserted in the description.

(a) Reported by E. H. Reed, Esq.

Mr. *Cooke* urged that there had not been such an occupation or use of the office in Threadneedle Street as to render it necessary to add that address to the description; and respecting the address at Sydenham, that was an error of the printer or some other person, and it would be a hardship to hold the insolvent responsible. The description given was ample to identify the man, and that satisfied the requirements of the statute.

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MR. COMMISSIONER MURPHY. I don't see how the objection can be got over. The insolvent accepts the office of a director in a mining company, and describes himself in the prospectus as of Sydenham: he says the description was made in error, and that he pointed it out to the solicitor of the company, but he allowed it to continue, and that address was never altered; he must readvertise, describing himself as of Sydenham, and also of the office in Threadneedle Street.

*Judgment.*

Attorneys, *Miller & Horn; Buchanan.*

## RE GEORGE HARRIS CHILD.(a)

Before MR. COMMISSIONER MURPHY.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

*Sept. 16.*

THE insolvent, a wine and brandy merchant, applied for his discharge under 1 & 2 Vict. c. 110., and was opposed on the ground of a vexatious defence to an action which had been brought against him.

Where an insolvent gives to an attorney a general authority to act for him, and he, without communicating with the insolvent, pleads to an action which has been brought against him, the Court will hold the insolvent responsible for the consequences.

It appeared that in 1851, a bill for 100*l.* had been drawn by one Trill, accepted by the insolvent, and discounted by the opposing creditor, with whom some wine warrants were deposited as collateral security. In January, 1853, the insolvent, being in difficulties, had placed his affairs in the hands of a solicitor, with a general authority to act for him in arranging with creditors. In February of the same year, an action was commenced on the bill, to which, after various delays, the insolvent pleaded that *he did not accept*. Eventually, and after notice of trial, a judge's order was given for the payment of debt and costs, and the insolvent taken in execution. In consequence of the defence, the costs had been increased between 17*l.* and 18*l.*

On examination by Mr. *Cooke*, the insolvent swore he was not aware of the writ being issued against him; his attorney had received it and all subsequent proceedings in the action, but he

(a) Reported by E. H. Reed, Esq.

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had not communicated with him on the subject, as he was then suffering from severe illness. It was alleged that the value of the wine warrants amounted to 120*l*.

Mr. *Cooke*, for the insolvent, urged that the defence to the action proceeded entirely from the attorney, and it would be a hardship on the insolvent to hold him responsible.

*Judgment.*

MR. COMMISSIONER MURPHY said it was clear the opposing creditor had been vexatiously put to 17*l*. expense; the plea was untrue, and it ought not to have been pleaded. It had been urged that the insolvent ought not to be held responsible, inasmuch as his attorney had acted without instructions. The attorney had general instructions to act for the insolvent; and if, in such a case, he were to say that, because no particular instructions had been given, the insolvent was exonerated from all blame in the transaction, it would open a wide door for imposition, and it would be impossible to say where such excuses would end. There were circumstances of mitigation connected with the case: the opposing creditor held security to nearly the amount of debt and costs, and the judgment of the Court would be that the insolvent should be discharged in three months from the date of the vesting order.

Attorneys, *Thomas & Sons*.

## EXPARTE THE ASSIGNEES OF BROCK IN RE BROCK. (a)

Before MR. COMMISSIONER FONBLANQUE.

COURT OF  
 BANKRUPTCY.  
 Aug. 25. & 31.

Where an assignee of furniture, &c. under a bill of sale allowed the goods to remain in the possession of the bankrupt, until after a petition for adjudication had been filed in this Court: *Held*, the assignees were entitled to an order to sell the same for the benefit of the creditors under sect. 125.

THIS was a petition presented by the assignees of the bankrupt under the order and disposition clause of the Bankrupt Law Consolidation Act, 1849 (*b*), for an order to sell certain furniture, &c., under the following circumstances:—

The bankrupt's wife had certain furniture, &c., which on her marriage with the bankrupt in 1850, was assigned to a trustee upon trust for her separate use. This, together with other furniture and effects of the bankrupt, was removed to their house at Brixton, where the bankrupt and his wife resided at the time of the bankruptcy. In November, 1852, by a bill of sale, to which the wife was not a party, the bankrupt assigned to Sadgrove all the furniture, &c. of himself and wife, to secure

(a) Reported by A. A. Doria, Esq. (b) 12 & 13 Vict. c. 106. s. 125.

of the Bankrupt Law Consolidation Act, 1849, as being "in the order and disposition of the bankrupt, with the consent and permission of the true owner."

the repayment of 209*l.*, of which 100*l.* had been lent to the wife before her marriage. A mere formal possession, (if any), was taken by Sadgrove, but the goods remained in the possession of the bankrupt. In February 1853, the bankrupt was arrested upon a *ca. sa.*, whereupon several other detainers were lodged against him. He remained in prison more than twenty-one days, which constituted the act of bankruptcy. On the 6th of June a petition for adjudication was presented; on the 7th Sadgrove took possession of the furniture, &c. under the bill of sale, and on the 8th Brock was adjudicated bankrupt.

An application had been made by the assignees to Mr. Commissioner *Holroyd* for an order to sell, on which occasion Sadgrove was present, and submitted to the jurisdiction of the Court; but he contended he was entitled under the bill of sale, whereupon his Honour directed a petition to be presented and served on Sadgrove. The petition having been presented, the case now came on to be heard.

Mr. *Tripp*, for the assignees. We are obliged to apply to this Court in consequence of a recent case in the Exchequer, in reference to what is called the "order and disposition clause," and the respondent submits, though perhaps, it was not strictly necessary to serve him; but he has been served, and appears and submits to the jurisdiction.

Sadgrove was the attorney of the bankrupt's wife, previous to, and since her marriage, but did not become the bankrupt's attorney until February, 1852. The deed was evidently, on the face of it, prepared in great haste, and the wife is not made a party, although it professes to deal with her property (a): the

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(a) The redemption clause in the bill of sale is as follows: "Provided always, and these presents are upon this express condition, that if the said E. Brock, his executors, administrators, or assigns, do and shall, on or before Dec. 1. 1853, well and truly pay, or cause to be paid unto the said W. H. Sadgrove, his executors, administrators, or assigns, the sum of 209*l.* 3*s.* 5*d.* of lawful English money, together with interest for the same half-yearly on the first day of May, and the first day of Dec. after the rate of 5*l.* per cent. per annum, to be computed from the day of the date of these presents, without any deduction or abatement whatsoever, out of the said principal sum or the interest thereof, then and in such case the bargain and sale, or other assurance hereinbefore made, shall cease and be void to all intents and purposes whatsoever."

And after some usual clauses, which were not called into question, came the clause following: "And lastly, the said E. Brock, his heirs, executors, and administrators, doth hereby warrant and defend, and from time to time, and at all times hereafter, covenant and agree to warrant and defend, all and singular the said several goods, chattels, &c. hereby bargained and sold, or otherwise assured, or intended so to be, unto the said W. H. Sadgrove, his executors, administrators, and assigns, and to permit and suffer the said W. H. Sadgrove, his executors, administrators, or assigns to enter any premises, and take possession thereof, and to remove and sell the same, if he or they shall think proper at any time, after default in payment of the said principal, or interest according to the aforesaid proviso."

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usual redemption clause is also omitted, as in *Martindale v. Booth*. (a) I submit that the legal control over these goods passed *eo instanti* the deed was executed;—that at law Sadgrove was entitled to the possession; and that the bankrupt must come into equity to assert his claim to redeem. If, then, Sadgrove had taken possession, and kept it, the bankrupt had no remedy except in a Court of Equity. A sort of colorable possession was taken on the execution of the deed, but the goods remained in the bankrupt's possession until after the petition for adjudication had been presented. They therefore remained in the order and disposition of the bankrupt. Sadgrove must have considered he had a right to take possession, and this could only be on one of two grounds: either he had a right to an immediate execution, or when the interest was in arrear. The interest was not paid in May last, in consequence of which Sadgrove was entitled to possession.

Sadgrove knew of the different judgments entered up against the bankrupt, and was affected with notice of his circumstances. There are two points in this case:—I. If the Court be satisfied that the taking possession was on the 7th of June, the words of the Act are clear, and Sadgrove is not protected by the order and disposition clause. II. If the Court be not satisfied upon the first point, then Sadgrove had clear notice of the act of bankruptcy, and therefore he cannot be protected under the 133rd section. (b) As to the first point, Sadgrove is not protected by the 133rd section, because at the time of filing the petition the goods were in the order and disposition of the bankrupt. By the old law, the date of the fiat governed the case: but the old law entirely ceased when the new act came into operation, and to it fiats are unknown. The word “fiat” in the new law is used simply in reference to the old law. In the case *Re Styau* (c), the question was, whether the 133rd section extended to the order and disposition clause. This section contains the words in the corresponding section of the 2 & 3 Vict. c. 29.: therefore those words in this Act were said to apply to fiats then in existence. As to the second point, there was notice of the act of bankruptcy. Sadgrove began to be concerned for the bankrupt, when he went to prison in

(a) 3 B. & Ad. 498.

(b) By sect. 133. it is enacted (*inter alia*) that all conveyances by any bankrupt *bonâ fide* made and executed before the date of the fiat, or the filing of the petition, &c. shall be deemed to be valid, notwithstanding any prior act of bankruptcy, provided the person so dealing with

the bankrupt had not, at the time, notice of any prior act of bankruptcy, with a proviso, excepting out of the operation of this clause any conveyance or equitable mortgage made or given by any bankrupt by way of fraudulent preference.

(c) 1 Phill. 105.



February last. There is also another circumstance to be considered in this case, as to whether this deed was not in itself an act of bankruptcy.

Mr. *Bagley*, *contrà*. The circumstances under which we come here are somewhat peculiar, inasmuch as we were formally served with the petition. The order is necessary under the 125th section. The only question is, whether the Court can make the order in the way in which it is brought forward. The deed is not executed by the wife. [Mr. Commissioner *Fonblanque*. What do you say to its being a voluntary deed? It seems to be without pressure, and for a debt of a totally different nature.] I apprehend this question is not before the Court, and that the Court has jurisdiction only to make the order under the 125th section. [Mr. Commissioner *Fonblanque*. Then I am to understand you did not submit upon the question of fraudulent preference.] There is no evidence before the Court of a contemplation of bankruptcy. There was no act of bankruptcy before Feb. 19., and the deed was executed previously to this. The question before the Court is for an order to sell. This is a conditional bill of sale, of which the time for sale had not arrived. We had, therefore, only a qualified interest, which brings this case within the principle laid down in *Fenn v. Bittleston*. (a) Sadgrove had no power to oust the bankrupt from the use and occupation of these goods, and consequently they are not goods in the possession or power of the bankrupt, with the consent of the true owner, and therefore sect. 125. does not apply. Moreover, Sadgrove's ownership does not arise until December next, for until then the bankrupt is entitled to redeem. As to the fraudulent preference and the 133d section, they have no bearing on this case. The Court is only called upon to make the order prayed for.

Mr. *Tripp* in reply. We come before the Court upon the submission of Sadgrove: he may have an appeal to the Lords Justices, but he is not now to say that this question is improperly before the Court. As to whether this ought to be an order made *ex parte* — [Mr. Commissioner *Fonblanque*. I do not think you need trouble yourself much about that: I understand one of my colleagues has delivered an elaborate judgment upon this point. (b) What presses upon my mind is that, according to *Fenn v. Bittleston*, I have no jurisdiction. I think Sadgrove was not the true owner at the time of the bankruptcy, and if so, your remedy is elsewhere.] In *Fenn v. Bittleston*, the

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(a) 7 Exch. R. 152.

(b) *Ex parte Plimmer in re Plimmer*; 1 Bank. & Insolv. Rep. 83.

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mortgagee was not to take possession until a certain time. The proviso in that case is upon this express condition, that the deed should be void on payment of the principal sum secured thereby on a particular day, before which the title of the assignees of the bankrupt did not accrue; but they sold the premises before the day arrived. The bill of sale here does not contain the clause in the case in the Exchequer, but another clause is introduced, which brings this case within the case of *Martindale v. Booth*. Sadgrove was entitled to possession immediately on the interest being in arrear, and consequently the case of *Fenn v. Bittleston* does not apply. In that case there was a positive legal contract, and no entry could be made under the deed, except after default made in payment on the day named. Your Honour recollects the cases, from *Twine's Case*, the leading case on this subject (a), down to *Edwards v. Harben* (b), and *Martindale v. Booth*, where the question as to the right to possession was fully discussed. If by the terms of the deed the party could not take possession, it cannot be said to be a fraud. In the case in the Exchequer he was not the true owner. Sadgrove did not consider he was not the true owner; he had taken possession nominally, and this distinguishes this case from *Fenn v. Bittleston*.

*Judgment.*

MR. COMMISSIONER FONBLANQUE. I shall take time to consider this case, with the view of looking into the deed, as to whether there is anything in the terms of it to take it out of the case of *Fenn v. Bittleston*; but I may say that, unless I so find it, I think Mr. Sadgrove was too late in taking possession.

*August 31.*

HIS HONOUR said: I have looked into the case of *Fenn v. Bittleston*, cited at the bar, and the bill of sale in this case, and find a very material difference between the two cases. In *Fenn v. Bittleston* no entry could be made until a certain time, which had not then arrived. In this case Mr. Sadgrove might have entered long before, and neglected to do so. I am therefore of opinion, that the order for sale must be made according to the prayer of the petition.

Ordered as prayed.

Solicitors, *O. Richards*; *W. H. Sadgrove*.

(a) 3 Co. R. 80.

(b) 2 Term R. 587.

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EXPARTE SIR EDMUND LACON, BART., YOEELL,  
AND CO., IN RE COLK. (a)

Before MR. COMMISSIONER FANE.

COURT OF  
BANKRUPTCY.

August 6.

THE notice of motion in this case was for an order declaring Sir Edmund Lacon, Bart., Youell, and Co., bankers at Norwich, equitable mortgagees of certain property in the county of Norfolk belonging to the bankrupt, for the sum of 1931*l.* 5*s.* 10*d.*, and to be allowed to come in and prove under the bankruptcy for so much thereof, as the proceeds of the said property upon a sale would be insufficient to pay, as a debt against the general estate; and also to prove for 500*l.* 6*s.* 5*d.* with interest; and that Joseph H. Allen and George Durrant, claiming as prior mortgagees of part of the property, which had been mortgaged to them together with other property of the bankrupt, ought to resort in the first instance to such other property, and exhaust that, before coming upon the property claimed by the bank, in order that the proceeds of a sale of the latter property might be applied exclusively to pay the demands of the bank. This notice of motion had been served on the first mortgagees, for whom Mr. *Rogers* appeared.

*Semble.* This Court has no jurisdiction to marshall assets as between mortgagees, without the consent of all parties. A deposit of old title deeds, in which the name of the depositor is not mentioned in any way, for the purpose of giving a lien upon the estates comprised in such deeds, confers a good title by way of equitable mortgage, as against the general creditors of the bankrupt.

*Statement.*

Mr. Commissioner *Fane* said: What you ask me to do is, to marshall the estates as between the mortgagees.

Mr. *Rogers.* I really do not know for what purpose we are brought here, and must ask to be dismissed.

Mr. *T. C. Wright* for the bank. We ask to be declared equitable mortgagees of certain premises. [Mr. Commissioner *Fane.* You ask me to marshall assets; what jurisdiction have I in the matter? All you ought to ask me to do is, that some part of the property may be sold, and the proceeds applied to the discharge of your debt.] Yes, Sir, but I must serve the notice upon every person interested in the property. This application is under the 55th and 17th orders of October, 1852. (b)

(a) Reported by A. A. Doria, Esq.

(b) By the 55th of the general orders of October 1852, under the stat. 12 & 13 Vict. c. 106. s. 8., upon application (which shall be in manner prescribed by Rule 17.) by any person claiming to be a mortgagee of, or to have security over, any part of the bankrupt's estate or effects, real or personal, and whether such mortgage or security shall be by deed or otherwise, and whether of a legal or equitable nature, the

Court will proceed to inquire, &c., and if it shall be found that such person is such mortgagee, or is entitled to such security, and no sufficient objection shall appear to the title of such person to the sum claimed under such mortgage or security, the Court will then proceed to take certain accounts specified in the order, and direct a sale of the mortgaged property by the assignees (unless it be otherwise ordered);

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[Mr. Commissioner *Fane*, addressing Mr. *Rogers*: I may dismiss you. You must have your costs, of course.]

In August, 1851, the bankrupt, being largely indebted to the bank, was pressed to give security for the balance then due, whereupon he promised to deposit title deeds relating to various public houses and other property for that purpose; and, prior to Sept. 3. of the same year, he accordingly sent to the bank certain title deeds and documents relating to three public houses, called the Bear Inn, the White Horse Inn, and the Maid's Head Inn, at North Walsham. In September he sent other title deeds relating to the Dog Inn, the Swan Inn, and to a messuage and cottages situate at Eccles. The deeds sent in August comprised all the existing title deeds of the three houses, except the conveyances thereof to the bankrupt by one Shephard, the party from whom he had purchased them.

The bank being dissatisfied with the security, the following letter was written to the bankrupt:—"27th September, 1851. We did not receive a parcel as usual yesterday; perhaps you will explain why, and when we may expect the remainder of the securities, as also the ones we hold to be perfected. Yours, &c., Lacon & Co." The reply to this letter was as follows:—"October 3rd, 1851. When I wrote the other day, I had forgotten how many parcels I had sent, but I now find I have sent them all. Yours, &c., W. Colk." Sir Edmund Lacon wrote in reply:—"4th October, 1851. I received your letter dated yesterday, and am extremely surprised at the contents, &c. The securities are not sufficient, nor are they perfected, being totally useless; the property (chiefly copyhold), being conveyed to Mr. Shephard and no further: we must insist upon further security. As you say you applied the money to stocking a farm, that security must be given us immediately. The securities we hold must be immediately perfected, and I have to insist that you either come over to Yarmouth, and satisfy our solicitor respecting the titles, or that he may put himself in communication with your solicitor at North Walsham,

but it shall not be imperative on any such mortgagee to make such application.

By the 17th Rule it is ordered, that (unless the Court shall otherwise direct) all applications to the Court in the exercise of its primary jurisdiction by virtue of the Bankrupt Law Consolidation Act, 1849, shall be by way of motion supported by affidavit, upon hearing which, the Court shall make such order as shall be just; but, in cases

in which any other party or parties than the applicant are to be affected by such order, no such order shall be made, unless upon the consent of such person or persons duly shown to the Court; or upon proof that notice of the intended motion and copy of the affidavit in support thereof has been served upon the party or parties to be affected thereby, four clear days at least before the day named in such notice as the day, when the motion is to be made.

whichever you please." In another letter, dated October 20, 1851, Sir E. Lacon wrote: — "It remains for you to perfect the securities, and to inform us of all particulars: this can easily be done by your stating what you propose to give us, and how you propose completing the titles of the several properties sent us; in fact, something definite must be done by you, and you only can know the amount of your property, and what is available for such a purpose. We cannot consent to any more delay, and must insist upon your at once laying before us the whole extent of what you propose giving us as a security, both real and collateral: what has been sent is of no earthly use." After sending this last letter the bank learned for the first time of the prior mortgages upon the Bear Inn, the White Horse Inn, and Maid's Head Inn to Allen; and again of these three houses, together with the Dog Inn and other hereditaments, to Durrant; and that the conveyances of these several premises by Shephard to the bankrupt, were in the possession of Allen and Durrant, or one of them, as such mortgagees, and who had allowed the bankrupt to retain all the existing title deeds, except those conveyances, and in this way enabled him to deposit them with the bank.

A negotiation was then entered into with Durrant by the bankrupt, with the approval of the bank, whereby Durrant was to pay off the debt due to the bank, and take a mortgage for the amount upon all the bankrupt's property. This negotiation was eventually abandoned, owing to the increasing difficulties of the bankrupt at the close of 1852.

A deed of arrangement was next tried, and failed, and on the 17th of January, 1853, an adjudication in bankruptcy issued.

Mr. *T. C. Wright*, on behalf of the bank, claimed as equitable mortgagees of the Dog Inn, the Swan Inn, the Plough Inn, the messuage and cottages at Eccles, the Bear, the White Horse, and the Maid's Head Inns. The deeds relating to the Dog Inn and the Swan Inn had been deposited with the bank. Those relating to the Plough Inn were held by a purchaser of a larger portion of the estate, of which this Inn had formed a part, and a deed of covenant to produce, &c., (the only one in the bankrupt's possession), was delivered with his consent to the solicitor for the bank as part of the security. This appeared in an affidavit made by the bankrupt, but on his cross-examination he denied having given any authority to his solicitor to deliver the deed to Lacon & Co., but said he intended it should be so delivered.

Two objections are made as to the mortgage on the property not admitted to be charged. The first objection includes the

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Bear, the White Horse, the Maid's Head, and the Dog Inns. The other objection relates to the Plough Inn.

No memorandum is necessary to make an equitable mortgage. A mere deposit of deeds without a word spoken creates an equitable mortgage, and this has been so decided over and over again. *Exparte Arkwright* (a) is an authority that the deposit of old title deeds creates an equitable mortgage. So also in the case of *Exparte Chippendale*. (b) There is distinct evidence of the intention of the parties in the bankrupt's affidavit.

Mr. Terrell for the assignees. We contend that the equitable mortgage is not charged upon any other property than the Swan Inn, and the messuage and land at Eccles. The other property, except the Plough Inn, was subject to a legal mortgage, in respect of which the mortgagee was entitled to all the deeds in the bankrupt's possession, custody, or power. The bankrupt could not, therefore, create a new security by merely pledging deeds, which he had no authority to pledge. The correspondence shows that the bank thought they had no good title, and this is what I say now. [Mr. Commissioner Fane. The letters read do not show that they had no security. The question is, did the bankrupt intend to pledge the security he had? and upon this depends the question, whether he intended to make the bank second mortgagee. The delivery of the deeds is nothing more than evidence of an intention to give security.] You cannot, by the Statute of Frauds, make a parol agreement to charge lands: where deeds are delivered, such agreement is not required, because the delivery prevents the mortgagor from dealing with them again. It was decided by Lord Cottenham in two cases (c) which came before him in one week, that a solicitor cannot take active proceedings in respect of deeds over which he claimed a lien: he can only hold them. The deeds, which a party deposits, must be his own to deposit, and in order to deposit them, he must have a legal and equitable right to hold them. This Court, like any other Court, will not carry the doctrine of equitable mortgages farther than this. If the bank had taken a memorandum, charging the property, it would have been sufficient. *Exparte Pearse*. (d) In the deeds deposited, the bankrupt's name is not even mentioned. [Mr. Commissioner Fane. It is a question which arises between the bank and the general creditors, and not between them and the bankrupt; and the bank, in my opinion, is in a better position than the other

(a) 3 M. D. & D. 129.

(b) 1 Dea. 67.; 2 M. & A. 299  
S. C.

(c) *Stedman v. Webb*, 4 M. & Cr.  
346.; *Bozon v. Bolland*, *ib.* 354.

(d) 1 Buck. 525.; 3 Martin's Conv.  
157., S. C.

creditors. This appears a question of intention.] It is a question of intention, evidenced by acts. The case of *Exparte Arkwright* shows an express written intention to charge the property; here, there is no evidence of intention, but a mere deposit. [Mr. Commissioner *Fane*. This deposit is inexplicable, except as it was made for the purpose of giving a lien; and if so, the depositor is stopped from disputing it. As between the bank and the general creditors, I have not the slightest doubt but that the bank has the best title.] There are no title deeds of the Plough Inn; none were ever deposited; but a negotiation between the bank and the prior mortgagees was entered into, whereby it was proposed that the first mortgagees should pay off the bank, and take all the title deeds. [Mr. Commissioner *Fane*. I should like to know how it is that the bank allege they have a charge upon the Plough Inn.]

Mr. *T. C. Wright*. By the bankrupt's affidavit.

Mr. *Terrell* resumed. The bankrupt has denied that he gave any authority for the covenant to produce, &c. to be delivered to the bank.

MR. COMMISSIONER FANE. I am inclined to think the bank has an equitable claim upon all the property, except the Plough Inn, and shall declare them to be equitable mortgagees of all the property, with that exception, subject, of course, to the prior mortgage; and shall direct the property to be sold, and that the bank be paid out of the proceeds of the sale; but they must pay all the costs of this motion. The whole of the proceedings have been irregular.

Solicitors, *Hawkins, Bloxam, & Hawkins*; and *J. & J. H. Linklater*.

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*Argument.*

*Judgment.*

## EXPARTE H. MILES, IN RE H. MILES AND C. MILES. (a)

Before MR. COMMISSIONER FONBLANQUE.

IN this case, the bankrupt's certificate had been suspended for two years from the 25th day of February, and "no protection for six months." The assignees obtained the certificate *B. a.*, under sect. 257. of the Bankrupt Law Consolidation Act, 1849, upon which they endeavoured to arrest the bankrupts, but were unsuccessful until about six weeks previous to this application, when Henry Miles was taken, and lodged in prison. The other bankrupt had not been heard of.

(a) Reported by A. A. Doria, Esq.

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Where, on a suspension of the certificate, protection has been refused to the bankrupt for six months, and he has kept out of the way to avoid an arrest, the Court will take this into consideration, and not discharge him at the expiration of the time limited.

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*Argument.*

The six months, for which protection had been refused, having expired,

Mr. *Plews*, (solicitor), applied for the bankrupt's protection, and cited *Ex parte Fell* (a) as an authority, that the six months must be reckoned from the date of the refusal of protection. [Mr. Commissioner *Fonblanque*. What do you take to be the meaning of the word "protection?" The order is that the certificate be suspended for two years, without protection for six months.] A bankrupt is always at the mercy of his creditors during the period for which protection is refused. The bankrupt has now undergone confinement for six weeks. *Manico's case* (b), before the Lords Justices, is the last case reported on this point.

Mr. *J. N. Mason*, (solicitor), for the assignees, opposed the application, on the ground that this was a case of a very aggravated character. One bankrupt had absconded, and the other had eluded the vigilance of the assignees for four months. He contended that the expiration of the six months formed no reason for granting protection now. The Registrar of the Court had been applied to, when the order was being drawn up, to introduce the words, "until they should have been in custody" for six months; but he declined to make the alteration suggested, saying it was unnecessary, inasmuch as the Court would construe the refusal of protection for six months to be that the bankrupt should be imprisoned for that period, taking into consideration the circumstance of his having kept out of the way to avoid process.

*Judgment.*

HIS HONOUR said: Whatever the difference of opinion may be, it is perfectly clear that the refusal of protection would be a mere nullity, if applications of this nature were attended to. The refusal of protection is intended as a punishment to mark the sense of the Court of the bankrupt's conduct as a trader, and as a mode of affording facilities to creditors. It was not intended that a bankrupt, unprotected, should be allowed to surrender one day before the time limited, and the day after apply for his discharge. He should make no order.

Application refused.

On a subsequent day, Mr. *Lawrance*, (solicitor), renewed the application in this case, before Mr. COMMISSIONER HOLROYD, who declined to interfere, or order the bankrupt's discharge out of custody.

Solicitors, *Lawrance, Plews & Boyer; Mason*.

(a) 1 Bank. & Insolv. Rep. 23.

(b) 17 Jur. 359.



EXPARTE THE ASSIGNEE OF EDWARD  
PARKES, IN RE EDWARD PARKES. (a)

Before MR. COMMISSIONER HOLROYD.

AN adjudication was made in May, 1850, against the bankrupt as Edward Parkes, of Canterbury, shoe manufacturer, in respect of which he duly surrendered, but did not obtain his certificate. He afterwards came to London, and in January of the present year, commenced business in Ebury-street, Pimlico as a corn chandler, under the name of Edward Henry Parkes; he continued this trading up to September 7, when he was again adjudicated bankrupt, as Edward Henry Parkes. The former bankruptcy had not been annulled.

Under these circumstances, the assignees under the first bankruptcy presented a petition, praying "that the proceedings under the second bankruptcy might be impounded, and that no further proceedings might be taken thereunder without the special order and direction of this Court, and that the estate and effects of Edward Parkes, which had, or might come to the hands of the official assignee, might be ordered to be held by him on account of the said bankrupt's estate, and for the benefit of the creditors under the first bankruptcy, until such as had proved, or might prove, should have been paid in full."

An examination of the bankrupt was read, to show that since his first bankruptcy he had no settled place of residence, and had not traded on his own account until he commenced business as a corn chandler; and also that neither the assignees, or the creditors, under the former bankruptcy, had any knowledge of the subsequent trading.

Mr. *Lawrance*, (solicitor), in support of the petition, cited the 141st sect. of the Bankrupt Law Consolidation Act, 1849 (b), under which the title of the assignees arose; and the 63rd sect. of the act 6 G. 4. c. 16. (c) By sect. 25. of 1 & 2

(a) Reported by A. A. Doria, Esq.

(b) 12 & 13 Vict. c. 106. s. 141. provides, that all the personal estate and effects, present and future, wheresoever the same may be found, or known, and all property coming to him before he shall have obtained his certificate, and all debts due or to be due to him, shall become *absolutely* vested in the assignees for the time being for the benefit of the creditors, by virtue of their appointment, &c., and that such assignees

shall have the like remedy to recover the same in their own names, as the bankrupt himself might have had, if he had not been adjudged bankrupt.

(c) By s. 63. of 6 G. 4. c. 16. it is enacted, that the commissioners in bankruptcy shall assign to the assignees for the benefit of the bankrupt's creditors, all his present and future personal estate, &c. in nearly the same terms as in s. 141. of the 12 & 13 Vict. c. 106.

1853.

COURT OF  
BANKRUPTCY.  
Sept. 22.

A second petition against an uncertificated bankrupt is not absolutely void at law.

Where an uncertificated bankrupt has been suffered to trade without interruption or claim on the part of the assignees of the first bankruptcy, they are not entitled to any after-acquired property in the bankrupt's possession at the time of the second bankruptcy, as against the assignees under that bankruptcy.

And, *semble*, the ignorance of such trading on the part of the assignees of the first bankruptcy, without evidence of diligence or activity on their part to enforce their rights, will not alter the case.

*Argument.*

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EXPARTE  
THE ASSIGNEE  
OF EDWARD  
PARKES IN RE  
EDWARD  
PARKES.  
*Argument.*

W. 4. c. 56. (a), upon which this Act is established, the assignment was dispensed with. The rights, therefore, of the assignees are equally applicable under the Bankrupt Law Consolidation Act, 1849. This point was fully discussed *In re Chambers* (b), in which the Court reviewed all the authorities upon the subject.

The substantial question is, not whether the second petition is void at law, of which there can be no doubt, but whether this Court, in the exercise of its equitable jurisdiction, will uphold it. Mr. Lucas has pointed out to me the cases of *Butler v. Hobson* (c), and *Herbert v. Sayer* (d), as authorities in his favour; but I do not see how they affect the rights of the assignees under the first bankruptcy. Nor also the cases of *Exparte Devas* (e) *Tucker v. Hernaman* (f), lately before the Lords Justices; and *Troughton v. Gitley*. (g)

The petitioning creditor had notice, at the time of filing his petition, that the bankrupt was uncertificated; he is therefore precluded from saying he was misled. The real question is, have the assignees done any thing to deprive them of their legal rights? They had no notice of the fresh trading; but, before the second adjudication was made, they interposed, and this circumstance distinguishes this case from *Exparte Devas*, unless the 141st clause of the statute is virtually to be repealed. There is also a striking difference between this case and *Tucker v. Hernaman*. If the assignees under the first bankruptcy are chargeable with not correctly ascertaining their rights, the future creditors are equally so; if it be a conflict between the two classes of creditors, it cannot be said to be the duty of the assignees to keep their eye upon the bankrupt, and follow him from place to place. We are, therefore, at least equally entitled in the same manner, as if the bankrupt had acquired a legacy.

Mr. Lucas, who appeared for the assignees of the second bankruptcy, was not called on.

*Judgment.*

MR. COMMISSIONER HOLROYD. The question raised by this petition is, simply whether a second petition for adjudication of bankruptcy against an uncertificated bankrupt ought to be annulled as *being void at law*. Mr. Lawrance relied upon the case of *In re Chambers*. In that case the Court declined to

(a) By 1 & 2 Will. 4. c. 56. s. 25. the personal estate and effects, present or future, of any bankrupt, shall, on his bankruptcy, become absolutely vested in, and transferred to the assignees for the time being by virtue of their appointment, without any deed of assignment for that purpose.

(b) 2 Dea. 494.

(c) 5 Scott, 798.; 4 Bing. N. C. 290., S. C.

(d) 5 Q. B. R. 965.

(e) 4 D. & Ch. 366.

(f) 2 De G. M. & Gor. 281.

(g) Ambl. 629.

adjudicate upon a fiat, which, according to the authorities *then* in force, was void at law. The question now is, not upon the propriety of adjudicating the bankruptcy, but as to annulling a petition upon which an adjudication has been made. Now, this is clearly a matter for the discretion of the Court; and the question therefore is, whether, in the exercise of that discretion, the facts of this case, as appearing upon the petition and evidence adduced, are such as to call upon the Court to annul the second petition. It appears to me, that since the cases of *Butler v. Hobson*, and *Herbert v. Sayer*, a second petition for adjudication against an uncertificated bankrupt is not absolutely void. There may be property upon which it may operate; after-acquired property may be suffered to remain in the possession of an uncertificated bankrupt, as reputed owner, and in such case such property would pass to the assignees under a second petition.

In the present case it appears that the bankrupt, though uncertificated, has been suffered to trade without interruption or claim on the part of the assignees under the first bankruptcy. They may or not have been ignorant of what was going on. There is no evidence, however, of any diligence or activity on the part of the assignees to enforce their rights upon after-acquired property. They seem to have been quite passive. Under these circumstances, I am of opinion that the Court ought not to accede to the prayer of this petition, and that it must be dismissed. The assignees under the first petition giving up all claim to the after-acquired property, and the assignees under the second petition consenting, the costs to come out of the estate.

Petition dismissed. (a)

Solicitors, *Lawrance, Flews & Boyer: Brandrett, Randall & Simmons.*

(a) In a case in bankruptcy some years ago a person of the name of Neal had been declared bankrupt as a cheesemonger, but had not obtained his certificate. In 1850 he was again adjudicated bankrupt under the name of Newton, in which he

was described as a miller. A petition presented to Mr. Commissioner Holroyd, on behalf of the assignees under the first bankruptcy, to annul the second adjudication, was dismissed. *Ex relat. Mr. Lucas, In re Neal*, Sept. 1850.

### ANONYMOUS. (b)

Before MR. COMMISSIONER FANE.

**T**HIS was a trader debtor summons, and an affidavit was made by the attorney of the summoning creditor, that he had served

(b) Reported by A. A. Doria, Esq.

1853.

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THE ASSIGNEE  
OF EDWARD  
PARKES IN RE  
EDWARD  
PARKES.  
*Judgment.*

COURT OF  
BANKRUPTCY.  
August 5.

By sect. 78. of  
the Bank-  
rupt Law  
Consolidation  
Act, 1849, the

1853.

ANONYMOUS.

*Argument.*

affidavit of debt and notice must state "the delivery to the trader personally, or to some adult inmate at his usual or last known place of abode or business, of an account in writing of the particulars of his demand," &c.

Where the affidavit did not state where the service was effected, the summons was dismissed with costs.

the particulars of demand on the wife of the alleged debtor, but omitted to state where the service was effected.

Mr. *Bagley*, for the alleged debtor, objected that the affidavit of service was insufficient under the 78th section.(a) For anything that appeared to the contrary, the wife might have been served abroad, or in a distant part of the kingdom. The foundation of the summons was deficient, and would not have been issued if the defect had been pointed out to the Commissioner by whom it was signed.

Mr. *Cooke contra*, contended that the law presumes that married persons live together: and secondly, that the appearance of the debtor was a waiver of any irregularity in the service.

MR. COMMISSIONER FANE. The law does not presume anything as to residence that I know of; and if so, it would presume contrary to the fact. As to the waiver, the debtor only admits he has been served with a summons; it is no admission that he has been served with the particulars of demand. I am of opinion that the Act of Parliament has not been sufficiently complied with in this case. The summons must be dismissed with costs.

*Solicitors, May; Cragg & Jeyes.*

(a) 12 & 13 Vict. c. 106.

COURT OF  
BANKRUPTCY.*August 25.*

Where the admission of a debt, under a trader debtor summons, was taken by a solicitor in the country on unstamped paper, and was not stamped until after the day on which the summons was returnable, the Court declined to receive it as an admission under the 84th section of the Bankrupt Law Consolidation Act, 1849; but, *semble*, the point will be reserved, if necessary, as an equitable defence to the adjudication.

ANONYMOUS. (b)

Before MR. COMMISSIONER FONBLANQUE.

IN a trader debtor summons, the admission of the debt was taken by the solicitor of the debtor, in the country, in the form required by the 84th section of the Bankrupt Law Consolidation Act, 1849(c), but was not stamped as required by sect. 48. This admission was forwarded to the London agent, who delivered it to the creditor before twelve o'clock of the day on which the summons was returnable, and was not filed by him till after three o'clock p. m. of the same day, at which time it was too late to have it stamped as of that day: but the stamp was afterwards affixed.

(b) Reported by A. A. Doria, Esq.

(c) By sect. 84. of 12 & 13 Vict. c. 106. an admission of a debt after summons signed by the trader, elsewhere than before the Court, in the

presence of an attorney, who is to attest the same, may be filed in Court, and shall have the same effect as an admission signed in Court.

The present application was for the purpose of having the document so stamped received as an admission made on the day on which the summons was returnable, so as to make it valid under the 79th section (a), on the ground that it was owing to the wilful neglect of the creditor that it had not been stamped in time.

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EXPARTE  
ANONYMOUS.  
Statement.

HIS HONOUR thought he could not interfere at present, and declined to give any opinion, but said that if it should become necessary in subsequent proceedings, he would reserve the point for consideration, as to whether it was not a good equitable defence to the adjudication.

Judgment.

Solicitors, *Abbott, Jenkins, & Abbott.*

(a) By sect. 79. upon the appearance of the trader summoned, the admission of the demand (if made) shall be reduced into writing, and, after being signed by the trader, be filed in court.

## EXPARTE BARLEY IN RE BARLEY. (b)

Before MR. COMMISSIONER FONBLANQUE.

COURT OF  
BANKRUPTCY.  
Sept. 11.

THE petition in this case prayed that the fiat issued against the bankrupt in 1846 might be superseded. All the creditors who had proved under the bankruptcy had been paid in full, and had signed the petition to supersede, except one, and he, having died abroad, there was no one in this country to represent him, and give sufficient receipts.

Where all the creditors, who have proved under the bankruptcy except one, on whose behalf, the creditor being since dead, there is no one able to give a sufficient legal discharge, have been paid in full, and have signed the petition to supersede the fiat, the petition will be superseded accordingly, notwithstanding the bankrupt is an outlaw for not surrendering at his last examination, on payment of the debt due to the deceased creditor into Court.

Mr. *Bagley* supported the petition, and proposed to pay the amount of the deceased creditor's debt into Court. Of the other creditors, some were dead, but the amount of their respective claims had been paid to their executors, who had signed the petition on behalf of their several testators.

Mr. *Matthews* (Solicitor) for the assignees, suggested that the bankrupt was an outlaw, for not having surrendered on the day appointed for the last examination, or at the adjourned last examination.

Mr. *Bagley*. That is so. The bankrupt had surrendered to the fiat, but left England for Australia before the day appointed for the last examination arrived. There are several authorities that this circumstance is no objection to the presentation of this petition. *Ex parte Brown* (c), *Ex parte Magennis* (d), and *Ex parte Chambers*. (e) In these cases the bankrupt was actually in custody for a contempt in not surrendering. There are

(b) Reported by A. A. Doria, Esq.

(c) 2 Swans. 290.

(d) 1 Rose, 60.

(e) 1 Dea. 197.

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 EXPARTE  
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other cases as *Exparte Norcott* (a), and *Exparte Thomas* (b), in which the bankrupt was constructively in contempt for not coming to surrender at the last, or an adjourned meeting, he having surrendered at a prior meeting.

*Judgment.*

MR. COMMISSIONER FONBLANQUE. All the creditors consenting, I will make the order. The bankrupt must pay the amount of the deceased creditor's claim to the Official Assignee, and the costs of this petition.

Ordered as prayed.

Solicitors, *Woodward; Hill & Matthews.*

(a) Mont. 281.

(b) 3 D. & Ch. 234.

### IN RE BARNETT. (c).

COURT OF  
 BANKRUPTCY.  
 Oct. 4 & 11.

Before MR. COMMISSIONER EVANS.

A trader is not justified in providing by a judge's order for payment of a creditor, whose debt is not yet due, whereby his whole estate is liable to be swept away from his other creditors; not withstanding the judge's order is dated several months before his bankruptcy.

*Judgment.*

THE bankrupt in this case was adjudicated as a watch-case maker, on the 2nd of May, 1853; he filed his balance sheet on the 4th of August, and passed his last examination. October 4th was the day appointed for the certificate.

Mr. *Bagley* appeared for the assignees.

Mr. *Lawrance* (Solicitor) for the bankrupt.

MR. COMMISSIONER EVANS now gave judgment.

This is an application for the bankrupt's certificate. It appears by the evidence that on the 10th of January, 1852, the bankrupt was indebted to the amount of 626*l.* 17*s.* 8*d.* over, and above all his assets. On the 26th March, of the same year, he purchased a considerable quantity of gold. He was indebted to Engell & Samuels in the sum of 158*l.* 10*s.* They were holders of bills discounted by them, on which the bankrupt was liable, but which bills were not payable for a considerable time. Engell was the brother-in-law of the bankrupt.

On the 1st of April, the bankrupt agreed to give, and did give his consent to a judge's order for the sum of 463*l.* 19*s.*, and by the order it was stipulated that, unless the bankrupt paid an instalment of 50*l.*, execution might be levied for the whole. The 50*l.* were not paid, and all the property of the bankrupt was taken in execution, and, amongst the goods, a considerable part of the gold purchased on the 26th of March.

(c) Reported by A. A. Doria, Esq.

It also appears from the bankrupt's balance sheet, that he expended 362*l.*; and that his profits amounted to only 58*l.* 7*s.* 1*d.*

It appears, therefore, that the bankrupt carried on trade for years after he was hopelessly insolvent: this, in my opinion, is most unjustifiable; and although I am not prepared to say that the consenting to the judge's order brings the case within the 256th section of the 12 and 13 Vict. c. 106. (a) as a fraudulent preference, I have no hesitation in saying that the bankrupt, by agreeing to the judge's order, was guilty of a serious breach of duty to his other creditors. He provided for the payment to his brother-in-law of debts not due, he left his estate without one farthing, and thereby prevented any inquiry into his conduct, except at the creditors' own expense. His expenditure was also unjustifiable. No trader can be justified in expending more than his profits.

On a full consideration of the case, I am of opinion that the certificate ought to be adjourned for eighteen months from the passing of his last examination, to be without protection for six months, and the certificate to be of the third class.

Solicitors, *Stopher; Lawrance, Plews, & Boyer.*

(a) Art. 4. of sect. 256. provides that if the bankrupt shall at any time within two months next preceding the filing of the petition for adjudication of bankruptcy, fraudulently, in contemplation of bankruptcy, and not under pressure from any of his creditors, with intent to diminish the sum to be divided among his creditors, or to give an undue preference to any of them,

have paid, or satisfied any such creditor wholly, or in part, or have made away with, mortgaged, or charged any part of his property of what kind soever, the Court shall refuse to grant his certificate, or suspend the same for such time as it shall think fit, and shall, in like manner, refuse to grant the bankrupt any further protection.

## RE RICHARD DUNN. (b)

Before THE CHIEF COMMISSIONER.

THE facts of this case will sufficiently appear from the judgment.

THE CHIEF COMMISSIONER. The debt of a plaintiff to a defendant for costs is within the 78th section, as a debt contracted by means of false pretences, if it appears to the Court that the claim made in the action was known by him to be unfounded.

(b) Reported by E. H. Reed, Esq.

was known by him to be unfounded, he will be held to have contracted a debt by means of false pretences, within the meaning of sect. 78. 1 & 2 Vict. c. 110.

1853.

IN RE  
BARNETT.  
Judgment.

COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.  
July 29.

Where an insolvent is indebted for costs in consequence of having brought an unsuccessful action, and it appears to the Court that the claim made

1853.  
 RE RICHARD  
 DUNN.  
*Judgment.*

The insolvent, Mr. Dunn, is in custody, on a writ of *ca. sa.*, for the costs on a judgment of the Court of Queen's Bench, for not proceeding to trial. The learned counsel for the creditor, who was defendant in the action, asks the Court to deal with this debt for costs, as a debt improperly contracted within the words of the 78th section of the statute; and it is right that I should first advert to this point. That section speaks of cases where it shall appear to the Court that a debt has been contracted under particular circumstances; which are as follow,—fraudulently, by means of a breach of trust, by means of false pretences, and without reasonable or probable expectation of paying. The first question, then, is, whether the debt of a plaintiff for the defendant's costs, can be called a debt *contracted* by him. As the point is not new I will revert to past cases. Mr. *Cooke* has mentioned a case of *Wolsey (a)*, where the action was upon an instrument which the plaintiff knew to be a false one; and I see that, in that case, on noticing the doubt which had been suggested by counsel on the words "debt contracted," I observed that a similar question had been made, many years before, on the meaning of the expression "debts incurred." At the time so referred to, the law disabled a man from receiving a second discharge by this Court within five years after a bankruptcy or insolvency, unless he could show that his new debts were necessarily incurred, &c; and it had been there urged that a plaintiff who became liable for costs did not incur a debt, because it arose contrary to his wish, and not out of any contract on his part; so that it was not a debt, the necessity of which he was called upon to show. It was held, however, that one whose liability has arisen out of a transaction which he wilfully originated, must be deemed to have contracted the debt; and, as the insolvent had been resisting a bankruptcy by bringing wanton and injurious actions, justified on no honest or legal principle, and, failing in them, was in custody for costs, he was considered to have incurred that debt unnecessarily. Having so referred to that construction about "incurring a debt," I gave my opinion in the case cited by Mr. *Cooke* that the insolvent had there also incurred and contracted his debt for costs unnecessarily; and worse than unnecessarily,—he had brought the action in the mere spirit of wrong. The debt for costs was the fruit of an unjust and vicious attempt to obtain money through an abuse of the law. I may refer also to a case of *Jacobs (b)*, where a man, having been defeated in an unjust claim, from mere malice and revenge instituted a *qui tam* action for penalties, having no just ground

(a) Not reported.

(b) Not reported.



for so doing, and no chance nor intention of paying costs, it was held that he contracted the debt for costs without any expectation of paying it. There was a much earlier case of *Gomm (a)*, in which I find myself to have made these observations: That the case was open to a judgment for withholding books, or for an unjust preference; but that I should record, as the ground of adjudication, the fraud in which the debt was contracted; that an argument had very properly been raised against so dealing with the subject, and that it ought to be a very clear and strong case to justify it; that in the case before the Court the insolvent had been paid, and overpaid; that he knew it, and in the pure spirit of fraud invented a false claim, as surviving out of his dealings with the defendant, and endeavoured to make the law an instrument of the fraud; the result was, that he contracted a debt for costs; that to contract debt does not necessarily import bargain or agreement: it is to bring yourself into the state of debt; which an unsuccessful plaintiff does when he becomes liable for costs. The question, therefore, was, whether the insolvent had done that fraudulently; on which point it was clearly established that his fraud was the sole spring and cause of the debt in question. I shall follow the principle of these decisions. I consider that Mr. Dunn has contracted the debt for which he is detained; and the question will be, whether his claim in the action ought or ought not to be considered as resting on false pretences.

It professes to rest on an authority contained in a communication received by him through the post, on the 3rd of December, 1844, when he had been three years and a half in the Fleet Prison, at the suit of Miss Coutts's friend, Mr. Alexander. He says that he at first refused to receive the letter and pay the twopence, but that the postman said, "You had better take it; it is from a lady: here are three seals on the back of it."

The address to Mr. Dunn, which is subscribed A. B. C., is all in verse, consisting of eleven stanzas. The words which are supposed to contain the authority on which Mr. Dunn drew a bill for 100,000*l.* fifteen months afterwards, are these, in the tenth stanza:—

"Send to Coutts's your bill —  
There are lots in the till —  
I'll give the clerk orders to do it."

Also those in the last stanza:—

"Fill a good round sum in,  
As I've plenty of tin  
To make you a good compensation."

(a) Not reported.

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RE RICHARD  
DUNN.  
*Judgment.*

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 DUNN.  
*Judgment.*

adopt the most summary proceedings to protect himself from outrage, and from being longer trifled with by Miss Coutts.

This threat was fulfilled. Not receiving the 100,000*l.*, he immediately gave notice to Miss Coutts, demanding payment; and, on the 31st March, made his affidavit of debt in the Court of Bankruptcy, stating her to be a trader within the bankrupt laws. Miss Coutts's legal advisers deemed it the fittest course that Mr. Dunn should be indicted for perjury on this affidavit; and in February, 1847, he was tried before Lord Denman; and, being convicted, was sentenced to eighteen months imprisonment, and required to find sureties to keep the peace for two years further. He was not released from custody till August, 1850.

The next act is that which calls for consideration here. On the 25th November, 1851, Mr. Dunn brought an action to enforce this very same claim of 100,000*l.*, founded on the bill which he drew in March, 1846, in pursuance of the supposed authority of December, 1844. We have to inquire, is this proceeding a false pretence, or can Mr. Dunn believe that his demand rests on honest ground?

I have looked into the evidence for anything calculated to produce such belief in Mr. Dunn's mind, and I find no fragment of fact or of circumstance which could give him that belief. It is indeed possible that a perseverance in wrong may at last so blunt a man's perceptions on a particular subject, that his mind will cling to conclusions in the utter absence of anything from which common reason can draw them. I am not warranted in imagining such excuse. I see in Mr. Dunn much power of reasoning; and it is my duty, in viewing his conduct, to hold him responsible for it. Where, then, can I find cause to suppose that the pretence, though false, was believed to be true? In the weighing of evidence we often find that, while there is something in both scales, the one so preponderates over the other, that all persons are relieved from doubt. Here all is in one scale: nothing in the other. When Miss Coutts herself, and Mr. Majoribanks, and Mr. Humphreys, swear that the writing is not her writing, and when no one has ever yet said that it is, that point is settled. This, however, is not enough: we inquire has anything happened to cause Mr. Dunn to think otherwise? He knows and can appreciate the evidence which concludes that point. What is there which can tempt his understanding to doubt it? Has he a witness to suggest a contradiction? He had none at the trial before Lord Denman. He had none for the trial appointed last February, in the Court of Queen's Bench. He has none now. He complains that that

trial, which he had so long delayed, was not again put off that he might produce a witness. He does not pretend that that witness would have come on a later day. None such is forthcoming now: and, while he declines to disclose who the person is, we are entitled to discredit his or her existence.

All positive evidence being thus in one direction, with no attempt in the other, is there anything in the circumstances which could bring Mr. Dunn to believe that which he says he did believe? At the time when that warrant to draw money, expressed in verse, came to Mr. Dunn, he had been continuously for three years and a half, and was still in prison, on a detainer caused by his offensive conduct towards the very person to whom he pretends to attribute that communication. Did these facts bespeak her to be the author? He says, indeed, that when the postman had delivered that epistle to the prison, he wrote a letter, which has been read, full of gratitude and enthusiasm: and he insists that the fact of his writing it is proof that he believed in the genuineness of that which he had received. It may be, that he did not know the author. It is possible that other inmates of the prison, knowing his habit of sending those unjustifiable letters, should, as a hoax, contrive those curious rhymes, to have a momentary laugh at his expense. But if they could impose upon him for the moment, how long would such an imposition last? In the absence of any belief founded on a knowledge of the writing, what would be the inference that an intelligent man would draw from the matter in this document? There is internal evidence of authorship. The "*capias ad sat faciendum*," and other phrases, would indicate to him that it came from a man and a lawyer, as plainly as the infusion of vulgarity would show that it did not come from a well-educated woman. The conviction which the stanzas are said to have inspired was not their probable effect. They contain more of ridicule than of sympathy. But if any one can credit that they prompted the extravagant epistle about love and money which presently followed from Mr. Dunn, let them note how, in a few days, he lapsed into a different strain, promising an appeal to the Insolvent Court.

These remarks touch only the possibility that Mr. Dunn, in the beginning of 1845, could be deluded into the belief that that communication authorised him to make a claim on Coutts's bank. Our question is, did he believe it in November, 1851? In the interval, he had had the opportunity of explaining his circumstances to the Bankrupt Court. He there detailed his rights, and swore to them. The right to claim the good round sum was not in the matters disclosed. Another year almost had elapsed, when his boldness rose to make the claim. It was con-

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 RE RICHARD  
 DUNN.  
*Judgment.*

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DUNN.  
*Judgment.*

founded by a conviction for perjury. The verdict of a jury found, that the claim not only was not based in truth, but was asserted without belief in its truth. I hold my mind free to receive all that might lead me to a conclusion different from that of the jury who tried that case. But I find no fact nor circumstance to shake it: and, if it was then without excuse to have pretended that the demand was just, how palpable now is the falsehood of that pretence, when the efforts of six years have produced no spark of evidence to improve its character.

This case is, indeed, one of much aggravation. It is sad to reflect on the power which any one of perverse and ill-regulated mind has to inflict discomfort and uneasiness even on those whom there can be no provocation to molest. Mr. Dunn, without a shadow of excuse, continued for years to annoy with his persevering impertinence, a lady, to whom he was an utter stranger, outraging all propriety, first by his offensive letters, and then by his absurd and false demands; and this course was pursued towards one whose exemplary life, commands the esteem and respect of all classes, — actively employed in doing good without ostentation. The persecution of this lady must raise the indignation of every good and generous mind. Painful, too, is the consideration of that which it has entailed on the offender himself. He suffered imprisonment as the lawful result of his conduct, and that imprisonment was lengthened by his own obstinacy in not seeking to be relieved from it. Again, the loss of liberty followed for an offence against the criminal law, — an offence which has been actually repeated this day in swearing to the schedule that lies before me. It is deplorable to think that such a fate has been studiously sought by one whose intelligence and energies are such as to have promised success and honour in his profession.

Mr. Dunn will be discharged forthwith as to other creditors, and, with regard to the detaining creditor (Miss Coutts), when he has been in custody at her suit for a period of ten calendar months from the date of the vesting order.

Attorneys, *Wright*; — *Humphreys*.

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EXPARTE ADAMS, IN RE WESTBROOK, AND  
EXPARTE ADAMS, IN RE KIRK. (a)

Before MR. COMMISSIONER GOULBURN.

1853.

COURT OF  
BANKRUPTCY.  
Oct. 19. 26.  
& 29.

BY a private act passed in the 5th and 6th of Will. 4., entitled "An Act for establishing a Market for the Sale of Cattle," at Islington, J. Perkins, his heirs and assigns, were authorised to open, establish, and hold a market for the sale of live cattle, to be called the "Islington Cattle Market," with all necessary powers for the support and continuance thereof, but subject to such compensation to the mayor, commonalty, and citizens of London, as therein mentioned.

Mr. Perkins, after having expended nearly 200,000*l.* in endeavouring to establish this market, contracted with the bankrupt, Westbrook, in 1848-9, for the sale to him of the market premises for 85,000*l.*, of which sum it was agreed that 50,000*l.* should remain on mortgage.

In 1849 a joint stock company was proposed for establishing a cattle market, with abattoirs, under the name of "The Islington Cattle Market and Abattoir Company;" with a capital of 200,000*l.*, in 20,000 shares of 10*l.* each: both bankrupts were promoters. Westbrook afterwards became a director, and he and Kirk both signed the deed of settlement as shareholders. Kirk was also resident manager. After remaining in possession for about a year, Westbrook contracted to sell to the company for 105,000*l.*, and in March, 1850, the premises were conveyed to Westbrook and others, as trustees for the company, in fee, subject to the mortgage. The directors, being unable to raise their capital, made default in paying off the mortgage-money, in consequence of which, Perkins recovered the premises in ejectment, and took possession in July, 1852; whereupon the company, which had never been completely registered, was dissolved, and their scheme abandoned.

In 1848 the premises were opened as a market and lairage, and on the 27th November in that year, the following circular was issued:—

"Islington Market. — Notice is hereby given, that the business of the above market will commence, for the sale of cattle,

(a) Reported by A. A. Doria, Esq.

Fraud, if clearly proved, is a sufficient ground for annulling an adjudication in bankruptcy; but mere concert is insufficient since the passing of the late Act.

So also, absence of assets is not *per se* sufficient. Where the bankrupt was described in the petition for adjudication as of two places, in neither of which he carried on the business alleged, and the place, where he did carry on business, was not adverted to, and it did not appear that any one had been misled, or that the misdescription was made with any fraudulent intent,—*Held*, a sufficient description within the 89th section of 12 & 13 Vict. c. 106.

The bankrupt had opened a lairage for cattle, and had sold hay to the drovers using the lairage with a view to a profit, first on his own account, and

afterwards in connection with others as a company, in their endeavour to establish a market, but in which they failed,—*Held* to be a trading, as a hay-dealer, within the operation of the bankrupt laws. Where, in a petition to annul, fraud and collusion are charged, and the charge is wholly unsupported by affidavit, and not substantiated by the evidence, and the adjudication is upheld, the petitioner will be ordered to pay the costs.

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sheep, and pigs, on Tuesday the 9th, and Friday the 12th days of January, and for the sale of horses, hay, and straw, on Wednesday the 10th of January, 1849, and will continue open on the same days in every succeeding week. The lairage is now complete. Fodder and water, with every other requisite, will be supplied on the premises, on the most moderate terms. By order, Armstrong and Westbrook, solicitors. Henry Kirk, manager. Market-house, Islington."

In the deed of settlement, the object and business of the company is described "as of a cattle market, for the sale of live cattle, beasts, &c., and live stock; also as a dead meat market, and for abattoirs; and to provide stores and warehouses for the reception and warehousing of farming stock and agricultural implements."

The market proved a failure, and the premises remained open as a lairage, first on account of Westbrook for a year, and then of the company, until the dissolution at Midsummer, 1852.

Considerable profit was derived from the sale of the hay, but, on the whole, great losses were incurred, and the directors were compelled to raise large sums upon their joint and several promissory notes.

In March, 1853, Adams entered up judgment in the Court of Exchequer, in an action against Westbrook, for 3421*l.* Westbrook afterwards filed a declaration of insolvency, which constituted the act of bankruptcy, and upon which he was adjudicated bankrupt on the 23rd September on the petition of one Barker, who claimed 106*l.* 13*s.* 4*d.* as due from Westbrook, in his capacity of director, for advertising the company.

On the 12th July, 1853, Kirk, being then a prisoner for debt, petitioned the Insolvent Debtors' Court, upon which the usual vesting order was made; but, as he did not file his schedule, nothing further was done. On the 9th August, Adams entered up judgment against him in an action in the Court of Exchequer for 3221*l.* 16*s.* 6*d.* He committed an act of bankruptcy by lying in prison for twenty-one days; and on the 7th September was adjudged bankrupt on the petition of one Nisbett, who claimed to be a creditor for the amount of 214*l.* 14*s.* 6*d.* for money advanced on a promissory note for 250*l.* made by Kirk, Westbrook, and three other of the directors of the company.

Mr. Adams presented two petitions, praying that the adjudication in each bankruptcy might be annulled at the cost of the petitioning creditors respectively, on the ground of there being no trading in either case; nor a sufficient petitioning creditor's

debt; nor any assets for distribution: and charging that in his belief "the petitions for adjudication were filed fraudulently, and in collusion with the bankrupts, for the purpose of discharging them from their liabilities, and not for the purpose of distributing any assets amongst the creditors."

A number of affidavits were filed, and a mass of conflicting evidence gone into, from which it appeared that hay was supplied to the drovers using the lairage at a fixed price of 3s. a truss;—that the moneys received for the hay went to the general fund, but that the charges for hay were kept distinct from those for lairage, and separate accounts also kept of the purchases and sales of hay;—that Westbrook signed several of the cheques for the purchase of hay;—that he and Kirk, with others of the directors, examined the accounts weekly;—that it was not compulsory on the drovers to purchase their hay from the company, but that they might, if they so wished, provide it from elsewhere;—and that the hay was not used for any other purpose, than for the cattle using the lairage, and a horse belonging to the company.

It was also stated that the hay was not bought and sold with a view to a profit, while on the other side it was declared, and Westbrook, in his examination, admitted it as a fact, that a profit was contemplated from, and a large profit actually realised by the sale of the hay. The affidavits in support charged, that Nisbett had consented to be the petitioning creditor in Kirk's case, upon having his costs and expenses guaranteed, and that such had been guaranteed by the friends and relations of Kirk. This was denied by Nisbett in his affidavit.

Westbrook further stated that he had given up to the official assignee 18,000 shares in the company, which, in the event of a Chancery suit then pending, for the recovery of the sum paid to Perkins in part of the purchase, on the ground of the title being defective, proving successful, would be worth 1*l*. per share; that he held 130 shares, of 20*l*. each, in the English Widows' Fund Assurance Society; and that a sum of 200*l*. was still due to him for attendances, as a director of that company.

Mr. Cooke and Mr. Petersdorff, for the petitioner. The affidavits in support of the trading are susceptible of explanation: they depose to a legal fact. There may be an apparent trading sufficient to support the allegation, but insufficient to uphold the adjudication. The allegation of trading is the effect of such buying and selling in the mind of the party making the affidavit. To support the trading the affidavit

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must contain all the facts relied on. The first knowledge of Westbrook is that, as a director of the company he bought and sold hay. Did he do so as a means of obtaining a livelihood, or simply as a member of the company? It is clearly shown, that the buying and selling was for the purposes of the lairage, and incidental to the enjoyment of the land, and not for the purpose of trade. The public generally were not supplied from this source. The company did not buy and sell as a trading company. The ground was never opened as a cattle market, although the ulterior object was to establish a market there, when that of Smithfield should be abolished. It was simply a place of rest for cattle in their way to and from Smithfield. The chief business of the company was to keep a lairage, and that required provision to be made for the foddering of the cattle, as the drovers did not bring their hay with them. The purchase and sale of the hay was incidental to the lairage, and was no more a trading than a schoolmaster's purchasing food and books for his pupils; *Valentine v. Vaughan*. (a) It cannot therefore be considered a trading, within the operation of the bankrupt laws. [Mr. Commissioner *Goulburn*. In the case of farmers buying and selling hay, the question was, whether this was done for farming purposes: was it consistent with the ownership of the land?] Several questions arise in this case. First, to what extent did the owner carry on trade? Secondly, with what intent or design? Here the intention is not shown, nor the quantity: no facts are disclosed of a trading, sufficient to make it a trading under the bankrupt laws. The only facts disclosed are, that the company took the land of Perkins, and did no more than Perkins had done before them. The lairage must not be lost sight of; it cannot be separated from the supply of hay: it was sold at a price fixed and unchanged, and there is no pretence for saying this was a trading for a profit. The prospectus announces that, "The market is in complete order, and already more than a thousand head of cattle are sent weekly, for the advantage of the superior lairage, water, &c." It then goes on to enumerate the advantages of the proposed market, which are,—first, the establishment of a dead meat market, adjoining the cattle market;—secondly, permission to slaughter, &c.;—thirdly, accommodation to all persons connected with Smithfield Market;—fourthly, the market will be conducted with every regard to both buyer and seller, &c.;—and fifthly, stores and warehouses will be provided for receiving farming stock, agricultural implements, &c.

(a) Peake, 108.



What would have been the position of Perkins, or of the owner of the freehold? Can it be said he would have been subject to the bankrupt laws? In brickmaking there has always been evidence to show a working distinct from the enjoyment of the land. Here the object of the parties is incompatible with the idea of a separate trading. They never contemplated becoming traders or dealers in hay. The hay account, if included in the transactions of the company, form part of the mode in which the affairs of the company were to be conducted. In every case of equivocal trading, we find that the primary object is of a very limited character. All the evidence before the Court shows the dealing in hay to be so mixed up with the object of the company, as to render it impossible to say it was a separate trading.

2ndly. There are no assets in either case, and no likelihood of any. Westbrook has signed a declaration of insolvency. Their sole object in coming here, affecting to be traders, is to free themselves from their liabilities. It is not right or proper that the machinery of this Court should be put in motion, when the object is for the benefit of the debtor alone. That proceedings in bankruptcy can only be maintained where there are assets for administration *in esse* or *in posse* has been decided over and over again. [Mr. Commissioner Goulburn. Lord Eldon has laid it down somewhere, that to sue out a petition in bankruptcy for any other purpose than the administration of assets is a fraud upon the Great Seal.] Most certainly no man ought to be allowed to do indirectly what he may not do directly. It is plain that the Legislature contemplated, that no pauper should be relieved by an act of bankruptcy, for it has in the Bankrupt Law Consolidation Act distinctly enacted, that no trader should make himself a bankrupt, without showing the probability of his estate paying five shillings in the pound. There is no ground for saying on the part of the bankrupts that there is any property to be administered. *Ex parte Brundrett*. (a) In *Ex parte Taylor* (b) it is laid down by Sir G. Rose, that "where a bankrupt has no property, and the petitioning creditor, well knowing that fact, issues a fiat against him, not for the purpose of any distribution of property, but for the mere purpose of enabling the bankrupt to obtain his certificate, and get discharged from his debts without paying one farthing in the pound, it is impossible to deny that the fiat is void on the ground of fraudulent concert." Here also the object of the petitioning creditors is to lend themselves to the purposes of the

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(a) 3 M. & Ayr. 50.

(b) 4 D. & Ch. 125.

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bankrupts; and this brings me to my third objection, — concert and collusion.

3rdly. That mere concert is an insufficient cause for annulling an adjudication appears in *Exparte Gaitskells* (a), *Exparte Lewis* (b), and *Exparte Spicer*. (c) In the latter case, Sir J. Cross said, "Under all the circumstances of that case, it was impossible to doubt, but that the fiat was concerted to defeat the execution; not for the purpose of serving the creditors, but for the private purposes of the bankrupt, and the petitioning creditor"; and he annulled the fiat at the costs of the party who sued it out. We have a distinct statement, supported by affidavit, that there are no assets, and no prospect of any. Our charge stands uncontradicted; and consequently, we are justified in seeking that this Court should come to the same conclusion.

In regard to Kirk's case, that is somewhat different in its circumstances. He is in custody. The act of bankruptcy on his part was lying in prison more than twenty-one days. He had filed his petition in the Court of Insolvency, but instead of going on with the proceedings there, he comes to this Court. It is his own fault, therefore, that he is still in prison. The points in Kirk's case are similar to those in Westbrook's. There is no trading. He is not a shareholder; and can have no interest or claim in the result of the proceedings in Chancery now pending. He was the resident manager with a salary; and was, therefore, only the servant of the company. He is also incorrectly described. In the petition for adjudication he is mentioned as carrying on trade at the cattle market, but he is not described as of that place. *Exparte Lewis*. (d) The description is essential. He should be particularly described as of the place where the trading is alleged to have been carried on; instead of this, he is described as of two other places, where he resided, but at neither of which did he carry on any trade. There are no assets.

Mr. Lawrance (Solicitor) for Barker, the petitioning creditor of Westbrook. The questions raised by the counsel on the other side are, 1st. Trading or no trading? 2ndly. Whether the assets are sufficient to support the petition for adjudication? and, 3rdly. Collusion. This is not an application to set aside the adjudication. The bankrupt, Westbrook, is no party to the proceeding; but the issue is immediately between the petitioning creditor and the petitioner. There is in this case abundant evidence of trading. Look at the invoices in the possession of the official assignee, and the books of the com-

(a) M. & Ch. 160.

(b) 1 M. D. & D. 365.

(c) 2 M. D. & D. 393.

(d) *Ubi supra*.

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pany, it is impossible to doubt that the evidence of trading is so abundant, as to set this question at rest. The ulterior object was to establish a market; and the evidence shows that this was an abortive scheme, which failed in its conception. Perkins failed in his endeavours to establish this market, because he was unable to pay to the corporation of London a sum of money, equivalent to the tolls of Smithfield Market. The company cannot come under the provisions of the Joint Stock Company's Act, not being completely registered. The concern is wholly without the exception of the 65th clause of the Bankrupt Law Consolidation Act, 1849, as not being "an incorporated commercial or trading company, established by Charter or Act of Parliament." There was a case of *Seagrim* before this Court only a few days ago (a), in which the bankrupt was described as a gas-man, and it was sought to establish a trading "as a director and shareholder in the Winchester Gas-light and Coke company, part of the business being to purchase coal, and convert it into gas, and also to sell the coke and tar to any person applying for it." But I contend that even if this company had been fully registered, and was a perfect company, the buying and selling of hay was no more a necessary part of their market, than the buying and selling the carriages used in conveying the beasts. In the cases of *Bolton v. Sowerby* (b), and *Stewart v. Ball* (c), it was held, that a farmer, who occasionally buys hay, corn, &c., with a view to sell again for a profit, was not a trader within the bankrupt laws. But in this case we are not confined to a single act of buying and selling; it was a general system. Westbrook and others purchased in large quantities by the load, and sold by the truss. Distinct accounts were kept of the buying and selling of hay; and these are distinct from the lairage. Was the hay then incidental to the lairage? Certainly not. The straw was incidental to the lairage, and this was not charged for. Assuming that the company had obtained their Act, still, as the directors had travelled beyond the object of their deed of settlement, in which there was not a word of lairage, and had bought and sold hay, they became subject to the bankrupt laws. The prospectus makes no mention of the sale of hay. The question whether a man is, or not a trader does not depend upon there being a profit, but whether the trading is carried on with a view to a profit. The result being of loss, and not of profit, does not affect the question of trading. Whether as directors they intended to buy and sell hay is not

(a) *Cor. Goulburn*, 30th Sept. 1853.

(c) 2 New R. 79., cited in *Newland v. Bell*.

(b) 11 East, 274.

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the question. If they did so, although it was not so contemplated, they were liable. In *Patman v. Vaughan* (a), *Ashurst J.* said, "I do not now consider the question of law to be governed by the quantum of trading; but I take the rule to be this, that where it is a man's common or ordinary mode of dealing, or where, if any stranger who applies may be supplied with the commodity, in which the other professes to deal, and it is not sold as a favour to any particular person, there the person so selling is subject to the bankrupt laws." See also *Bartholomew v. Sherwood*. (b) Both these cases are cited in *Cooke's Bankrupt Laws* (c), and are referred to and commented on in *Stewart v. Ball*. (d) So *Newland v. Bell* (e) as to the object of profit; *Holroyd v. Gwynne* (f), and *Exparte Lavender* (g) as to the question of intent. Even in bankruptcy a man's intention cannot be ascertained, except from his accounts. The question of bankruptcy was discussed at the company's board. The 65th sect. of the Bankrupt Law Consolidation Act is an exception, so to speak, against common rights, and must, therefore, be construed strictly. This case is different from that of a livery-stable keeper. The charge for lairage was not a comprehensive charge: had it been so I could have understood it. No further charge was made for the lairage of the cattle, which came back, and remained for the week, but the charge was for hay only. In the case in *Holt, Gibbs* C. J. lays down the principle thus: — "If a gentleman or farmer buy horses, sheep, or pigs for the use of his family, and, being overstocked, sells them again, he is not a trader. But if he buys with a view of profit from a resale, he is within the bankrupt laws. In the latter case the smallness of the profit does not signify, and one instance of buying and selling is sufficient. The fact and the question of intention are, however, for the jury." Westbrook had been a dealer in hay before he joined the company, and had made a large profit. What Westbrook did from 1849 to 1850 he did from 1850 to 1852; and what he did before 1850 is an act consistent with what he did since.

As to the charge of fraud and collusion they have not ventured to swear to it. Mr. Adams has made no affidavit in support; not the ordinary affidavit required by the Joint Stock company's Act. Nor does Clarke venture to swear to this charge. In every case cited by the learned counsel collusion is clearly made out. *Gaitskill's case* (h), *Brundrett's case*. (i)

(a) 1 T. R. 572.

(b) Ibid. 573 n.

(c) p. 55.

(d) *Ubi supra*.(e) *Holt, N. P. C. 221.*

(f) 2 Taunt. 176.

(g) 4 D. &amp; Ch. 484.

(h) *Ubi supra*.(i) *Ubi supra*.

Absence of assets is evidence on the part of the petitioning creditor to serve him, when proper. The object of this adjudication is to discover assets. In *Hertslett's case* (a), now before the Court, the same has been done. A petitioning creditor presents his petition in this Court at his peril. We have assets to the amount of 200*l.*, of which about 70*l.* have been got in. In the case of *Williams and Marchant* (b), now before this Court, there was not a farthing of assets when the petition was filed, but subsequently, by the diligence of the assignees, and the assistance of the Court, about 20,000*l.* have been realised, and every creditor has been paid in full.

Mr. *Bagley*, for Nisbett, the petitioning creditor in Kirk's case. This is a petition to annul at the instance of a single creditor, but not with a view of presenting another petition. Kirk, the bankrupt, is in prison at the suit of the petitioner, who we are told is a bankrupt. His object is either to keep Kirk in prison, or else to make better terms for himself at the expense of the other creditors.

As to the first objection, the misdescription, what does this mean under the present state of the law? By the 89th section of the Act (c), the creditor is to present a petition in a certain form. He may there describe himself as of his place of business, or of his residence. He conforms to the words and letter of the Act, which now for the first time gives the liberty of describing himself as of his place of residence. It is the duty of the officer of the Court to insert the proper description in the Gazette. In *Hennel's case* (d), the bankrupt was described as of Duke Street, St. James's, but he had a place of business, where he had extensive offices, and carried on a large business: Mr. Commissioner *Evans* admitted this was sufficient. It was carried to the Lords Justices, who thought that the justice of the case would be met by putting a new advertisement into the Gazette. The description we have given is strictly and literally true. A man may not have had a place of business for the last six months, and

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(a) *Cor.*, *Fonblanque C.*, 9th Sept. 1853.

(b) *Cor.*, *Goulburn C.*, 29th Nov. 1851.

(d) 12 & 13 Vict. c. 106. s. 89. sched. (M.) contains the form of the petition by a creditor for adjudication, and is as follows:—"The humble petition of, &c. Sheweth that, being a trader, and having resided [or carried on business, as the case may be] for six calendar months next immediately preceding the date of this petition within the district of this honourable court, that is to say,

at, &c., is indebted unto your petitioner in the sum of — pounds, and that your petitioner has been informed and believes that the said — did lately commit an act of bankruptcy within the true intent and meaning of the law of bankruptcy. Your petitioner therefore," &c.

The misdescription complained of here is, that Kirk was described as of his residence, but not of his place of business.

(d) *Cor.*, *Fane C.*, 19th March, 1853.

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therefore the Act requires the residence or place of business. The real question is, was the petition for adjudication intended to, and did it mislead any creditor by the description given? A want of *bona fides* must be shown. In *Exparte Lewis* (a), the bankrupt was an attorney's clerk, and went out of the way to avoid his creditors. In this case the bankrupt must give notice to the detaining creditor, Adams, before he can be released. *Exparte Mills*. (b) It is not alleged that anybody has been misled by this description. In fact, and I assert it with confidence, there has been no misleading.

As to concert and collusion between Kirk and the petitioning creditor, let us see how this is charged. It is charged in Clarke's affidavit, and is a matter of belief and hearsay throughout. If it had remained uncontradicted, the charge could not be relied on as worthy of the least credit. This has been very clearly decided in Equity in the case of *Exparte Stevens* (c), as to affidavits on belief. In such a case there is no necessity to answer. But we did not do that: we went to Eade, who says he has no recollection of having said as stated in Clarke's affidavit: the elder Nisbett denies having used the words attributed to him: he never saw Kirk in his life; and his son denies the guarantee for his costs sworn to by Clarke. How, then, can there be collusion between the parties? It is a physical impossibility. Nisbett's debt was for money advanced, in respect of which a promissory note was given, and this has been renewed from time to time. Can it be believed that Nisbett advanced 230*l.* in May, 1851, that he might, in September, 1853, make Kirk a bankrupt? Then as to the trading, this has ceased since the last six months, and therefore there could be no concert or collusion as to that. The only other point is the act of bankruptcy; this was a lying in prison for twenty-one days. If it were plain that Kirk desired this bankruptcy to go on, and the mere fact of his acquiescence makes no difference, we have the best evidence of his being a shareholder. We produce the company's deed of settlement, which he signed. That he was a partner is also perfectly clear; he signed the cheques, and held himself out to the world as a partner; he is therefore jointly liable with the other shareholders: and if liable to the other creditors, he is liable in this Court.

In regard to the charge of no assets. Kirk is an adjudicated bankrupt: a petition is filed to annul, and then, at the meeting for the choice of assignees, one is chosen, who is not in the least under the bankrupt's control. In such a case the Court will not annul the adjudication. I do not say this without authority, but

(a) *Ubi supra*.

(b) 3 D. & Ch. 606.

(c) 4 Madd. 256.

refer to the case of *Exparte Warwick*. (a) Nisbett is bound by the statute to pay all the costs up to the choice of assignees. A gentleman wholly unconnected with the bankrupt has taken upon himself the carriage of this bankruptcy. Why did he so take it? If Kirk had no assets then, he has none now. I have heard bankrupts in this building swear, and honestly too, that they had no assets, and yet, by diligence and the assistance of this Court, assets to a large amount have been recovered. In *Columbine's case* (b) the assignees were fought at every stage of the proceeding. Where did those assets come from? The fact that Nisbett has subscribed to the suit in Chancery is a proof of *bona fides* on his part. Want of assets alone has never been the ground, upon which a bankruptcy has been annulled. Unless collusion be associated, there is no case for annulling.

As to the last point, the trading, whatever was the trading in Westbrook's case is the trading here. It is admitted it was not compulsory in the persons using the market to buy the hay. The sale of hay was no more essential to the market than the sale of bricks to a railway station. There is no analogy in the case of a schoolmaster, but there is a strong analogy in that of a lodging-house keeper. *Smith v. Scott* (c), *Gibson v. King*. (d) In the schoolmaster's case he holds out to the world that his object is teaching. Now take the case of a lodging-house keeper taking in a lodger for the night, giving him a supper, lodging him for that night only, and in the morning charging him at a profit. This is precisely similar to the case here. There is also the case of an officer in the army, who bought fourteen pigs and sold them for a profit. (e)

Mr. Lucas appeared for the assignees.

Mr. Cooke replied. There was doubtless a buying and selling to a particular class of persons, the sole object of which was to establish the company. Perkins, Westbrook, and the others did not form a trading company, and the holding a market would not make them such: nor will any circumstance arising out of their taking the land constitute a trading. Where the primary object of any person is not a trading subject to the bankrupt laws, subsidiary or incidental acts done to make this primary object available will not make that person amenable to such laws. The lirage was incidental to the market. The failure of the object does not affect the question. [Mr. Commissioner Goulburn. The primary object was clearly to esta-

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(a) 4 Madd. 262.

(b) *Cor.*, Goulburn C., 13th  
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(c) 9 Bing. 14.; 2 Moo. & Sc. 35.  
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(d) 10 M. & W. 667.

(e) *Ubi supra*.

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blish a market. Did the company contemplate lairage as a secondary object?] They contemplated giving accommodation to cattle using the lairage. A farmer may become liable to the bankrupt law by keeping cows, but this alone would not constitute him a trader. In *Exparte Dering* (a), the Chief Judge held that a farmer keeping cows, and selling the milk regularly to a retail dealer, was not a cowkeeper liable to the bankrupt laws. I ask here, as was asked in that case, would a Cheshire farmer, whose chief profits arise from his dairy, be subject to the bankrupt laws? This case of *Dering* occurred since the passing of the Bankrupt Law Consolidation Act, and is therefore important. [Mr. Commissioner Goulburn. There is another case of *Carter v. Dean* (b) upon the same point.] No instance is shown of a sale of hay to any one but the drovers using the lairage. It is distinctly sworn that there was none. The circumstance of Westbrook's name being on the cart does not make him a hay salesman. The Act of Parliament requires it to be there. It is said there was no compulsion to sell to the drovers. Why, coming in late on a Saturday night, with several hundred head of cattle, where else could they procure hay? There was no profit on this part of the establishment, but there was a profit on the lairage, and the rents of houses and lands. It is idle, in an establishment like this, to talk of profits on any one article. On the whole there was a great loss, and the company has been dissolved. The cases cited by Mr. Lawrance have nothing to do with the case. I rely on *Exparte Gaitskells* (c) and *Exparte Taylor* (d) as to the trading.

There must be other property in fact or in prospect. Will any of the cases cited on the other side go to the length, in which the amount of the property was not taken into the account? The case of *Williams and Marchant* (e) was a hostile proceeding from the first. I submit this is not hostile. Whatever estates are realised in the suit in Chancery will have to be administered there. Are we to rely on the chance of a chancery suit in considering whether the machinery of this Court is to be put in motion, unless some proceeding in this Court is necessary? The cases cited by me have all been decided since the late Act.

It is quite clear that this proceeding is entirely for the bankrupts' own benefit, and with their concurrence. Barker himself has made an affidavit. The circumstances of these adjudications show collusion with the bankrupts' concurrence and consent.

(a) De G. R. 403.  
 (b) 1 Swan. 64.  
 (c) *Ubi supra*.

(d) *Ubi supra*.  
 (e) *Ubi supra*.



There is really no property to be administered. [Mr. Commissioner *Goulburn*. I do not consider any case of fraud and collusion has been made out. On the first branch, as to the trading, I will consider the cases, and give judgment on Saturday.]

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HIS HONOUR now delivered judgment in both cases. These petitions are not proceedings going merely to dispute the adjudication, but they are petitions addressed to the Court in the exercise of the original jurisdiction conferred upon it by the late Act. This is the first instance of any such proceeding being taken before me, and it is necessary to carefully examine the character of the application, and what is found in the books in relation to the principle involved. An application of this kind by a creditor is, I apprehend, one in which the Court must exercise its discretion; and many cases, decided by the Judges, in whom the original jurisdiction of this Court was formerly vested, show that it is not an application as of course. The Court has been very careful in the exercise of its discretion; and where questions of fact have been involved, the Lord Chancellor has commonly directed an issue to be tried by a jury. This was done by Lord *Eldon* in the case of *Exparte Bryant (a)*, and in many other cases. If, then, applications of this kind have been dealt with carefully, when made to the Great Seal, which originally seems to have had the sole jurisdiction in matters of bankruptcy without appeal, still more ought they to be so now, as it may be doubted whether we have the power of directing an issue to be tried by a jury; yet looking at the very large words in the Act of Parliament, giving to this Court "all the rights, incidents, powers, privileges," and so forth, in as full a manner as they are exercised by any of the Superior Courts of Common Law or Equity, it would probably be held that this Court has the same power as the Lord Chancellor, or any other Equity Judge would have, of directing an issue. But we have never done so: therefore it is, that in the exercise of this power, we are bound to use a peculiar degree of caution.

*Judgment*  
Oct. 29.

In regard to the allegations contained in these petitions, I may remark, that a great deal has been alleged, but very little proved. There are allegations imputing fraud and great misconduct to the petitioning creditor and the bankrupt in each case, as to which I have looked in vain for one particle of proof; not even a suspicion of it as to the petitioning creditor, in either case;

(a) 1 V. & B. 211.; 2 Rose, 1. S. C.

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and nothing but a very inferential suspicion, at most, against either of the bankrupts. Against Westbrook there is none at all; with reference to Kirk, a very suspicious mind might, perhaps, imagine such and such facts; but as to direct proof of fraud, not a tittle is to be found in any of the proceedings. The facts in each case are scarcely distinguishable, and the petitions are very nearly the same. The first allegation is, that the petition for adjudication in Westbrook's case was filed by the petitioning creditor, Charles Barker, and by David Nisbett in Kirk's case, fraudulently and in collusion with the bankrupts in each case, for the purpose of discharging them from the judgment debts of the petitioner, and their other debts and liabilities, and not for the purpose of distributing any estate or effects of the bankrupts amongst, or for any purpose useful or beneficial to the creditors. Now, this is a very strong assertion against both bankrupts, and one, which ought not to have been made without good grounds of proof. The Courts have always held that fraud is not to be assumed, or inferred, but must be proved. No man is to be convicted of fraud, and have his rights taken from him, except upon clear and positive evidence. In that, as in everything else, circumstances may concur to lead to an irresistible conclusion, and that, perhaps, may be the best evidence of fraud: but fraud is not to be assumed, and stated on belief and information, as in Westbrook's case, the party preferring the allegation not venturing to pledge his oath to the fact. I repeat, therefore, there is no pretence for the charge of fraud.

But let us see what, in the present state of the law, is sufficient to annul, or reverse an adjudication. Formerly, concerted acts of bankruptcy, or any attempt at concert, or connivance to make a man a bankrupt, would vitiate the commission. In those days, the bankrupt was rather pursued as a criminal; it was supposed that bankruptcy was a criminal proceeding; that it must be adverse, and that if the bankrupt lent himself to it in any way, the proceedings could not be sustained. But the law has undergone a great change in that respect. Not only may a man make himself a bankrupt under certain restrictions as to the amount of assets, but the 115th section of the late Act (a) provides "That no fiat in bankruptcy shall be annulled, nor any petition for adjudication dismissed, nor adjudication reversed, by reason only that the fiat, petition, adjudication, or act of bankruptcy has been concerted or agreed upon between the bankrupt, his solicitor, or agent, or any of them, or any creditor or other person," Nothing could be wider, or take a more ex-

tensive range than these words; and this provision has since been very frequently acted upon by the Judges. In *Ex parte Norton (a)*, Lord Justice *Knight Bruce*, then the Chief Judge in Bankruptcy, undoubtedly took for granted that fraud, if it could be clearly proved, would avoid the adjudication; but he goes on to say, "I will assume, for the sake of argument, that there were wishes on the part of the bankrupt that the petition should issue; but it is not material that it was issued, if it were so for the purpose mainly, or chiefly of affording the bankrupts such protection, as it might afford them against the consequences of proceedings at law, and without a predominant or active wish to benefit or assist their *bonâ fide* creditors." That bears importantly upon these cases, because Westbrook tells us he was very much beset by his creditors, and he wished, very naturally, to devise a mode, by which he might obtain the protection of the law, and be freed from his bygone engagements; and no doubt he has a very strong wish that these proceedings may be sustained. As to Mr. Kirk, nothing could be more clear and straightforward than his account of what passed between him and young Mr. Nisbett as to taking these proceedings. He was actually in prison at the time, and was, naturally enough, anxious to escape, and have his estate wound up in bankruptcy, as being a much more satisfactory and complete mode of settling one's affairs than by the discharge of the Insolvent Debtors Court. But this case has been argued as if the absence of all assets were *per se* a ground for annulling an adjudication. There cannot be a greater mistake. Mr. *Lawrance's* answer to that is undoubtedly quite correct, that frequently an adjudication in bankruptcy takes place for the very purpose of going in search of assets, there being a prospect of something being gained to the estate, which the creditors may think it worth while to pursue, and which, perhaps, the individual himself could not do. Hundreds of instances occur in this Court of parties being declared bankrupt, where there are no apparent assets, but where ultimately very large sums are realised, and the creditors get a good dividend. An instance very recently came before this Court in the case of *Williams and Marchant (b)*, who came to the Court without any apparent assets; but having, or supposing they had a large claim against a powerful and wealthy railway company, who had taken possession of all their tangible property, and left them apparently penniless; certain of their creditors took the matter up, they found the funds, and after a contest, in which the chances

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(a) 1 De G. 504.

(b) *Ubi supra*.

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seemed so strong in favour of the company, that I confess I never anticipated they would be other than successful, the justice of the case prevailed; and by the award of a very eminent man, Sir *William Cubitt*, the contractors got something like 20,000*l.*, sufficient to pay all their creditors 20*s.* in the pound. I am convinced that when that fiat was taken out the prospect of assets was even more remote than in the present case.

But if it could be shown that there were no assets in this case, which is not the fact, that would not avail to set aside the adjudication, although it might be one ingredient, and frequently an important one, in the inquiry whether there be fraud or not. Sir *George Rose* very clearly puts that point in the case of *Exparte Taylor (a)*; but that was in 1834, before either the Consolidation Act, or the one preceding it, had been passed. Sir *George* in his judgment introduces the words "fraudulent concert," and "there must be fraud." The absence of assets may be one means, in connexion with others, of showing fraud, and that view reconciles all the cases; but to allege, as a substantive proposition, that the want of assets is of itself sufficient to get rid of an adjudication in bankruptcy, is altogether a fallacy, and unsupported by any case in the books.

In Kirk's case it is also asserted, that he is misdescribed; that his description is given as of two places, in neither of which did he carry on the business alleged; and that the place where he carried it on (if at all), viz. the Islington Market, was never adverted to in the petition. If this had been done with a view to deceive, or if it had been suggested or proved that it had deceived anybody, or that any of the creditors imagined that the party adjudicated was some other person, I should have held that a very serious ground for inquiry, as to whether the adjudication ought not to be reversed, and a fresh petition taken out: but, on comparing this description with the schedule in the Act (b), I find they very nearly coincide; the only difference being, that the petition repeats twice what the form gives once. I am quite at a loss to discover any proof of fraudulent intent; and unless it be shown that this was done for the purpose of deceiving any one, I certainly shall not assume it as a matter of suspicion and inference; and, therefore, this not being shown, upon the first ground, I think this application wholly fails.

A more important question is, whether these parties were traders; for I am asked to annul the adjudication on the ground that they were not. They are described as "dealers in hay,

(a) *Ubi supra.*

(b) *Ubi supra.*

dealers, and chapmen ; " and it is alleged, that they bought and sold hay, as others of the same trade and business usually do. The question is, whether either Westbrook or Kirk has so traded in hay as to bring them within the operation of the bankrupt laws. This case being rather a peculiar one, and out of the ordinary course, I have looked through a great variety of cases and authorities as to what constitutes a sufficient trading under the bankrupt laws, and have come out of the inquiry without being able to reconcile them all. It appears to me that the principal question in all these cases is, as to whether there has been a substantial buying and selling to any large extent, for the purpose of gaining a profit. This definition is laid down by *Buller J.*, in *Patman v. Vaughan*. (a) Many of the cases put it upon the quantum of the trading, and make the question turn very much upon the smallness of the quantities sold ; but in this case it is held, that whatever the quantity, or however small it might be, if the intention was to make a profit, the trading was complete. *Buller J.* says, " As to the extent of the dealing, and the profit made, that is immaterial." In *Bartholomew v. Sherwood* (b), which was referred to in the last-mentioned case, a farmer was held to be a bankrupt, because he had bought and sold horses, not in the course of his business, but for the express purpose of gaining a profit by them. In the present case they bought hay, and sold it at a profit ; and there is no evidence of any express order against selling to others than the drovers, who brought cattle to the market ; nay, they said they would only have been too glad if other parties had purchased, because that would have increased their profits : and it is a mistake to say that the selling of the hay was compulsory ; it was an accommodation to the drovers to be able to purchase it at that place, of which they were willing to avail themselves : but there was nothing whatever to prevent any of them from bringing their own hay, or from purchasing it elsewhere. There was nothing to compel them to purchase hay at the market ; it was merely, as the prospectus expresses it, an accommodation. The way, in which this business of selling hay began, is very distinctly explained by both the bankrupts. Kirk, who is very anxious to have the merit of this speculation, was the party into whose mind it originally entered, that it would be a very profitable and humane speculation, if a market could be established in opposition to that at Smithfield, whereby a great part of the supposed cruelties practised there would be got rid of, and more accommodation and better-regulated premises might be procured. Accordingly,

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they set themselves to obtain subscribers, for the purpose of carrying their project into effect. Kirk, it appears, began very early to buy and sell hay. The notice which he first issued is important, and throws a light on this dealing in hay. (a)

It shows that the sale of hay undoubtedly entered into the original contemplation of these parties. It confirms the statement of Kirk and Westbrook, that the profit from the hay was the main ingredient in their calculations, and that they relied on making a profit by it. That cannot be questioned. Kirk went on by himself for some time; then Westbrook took to it, and had the concern for one year entirely to himself. During all that time there is the most conclusive evidence that hay was bought and sold in very large quantities, and that an amount of profit was derived, which forms a very considerable item indeed. Mr. Clarke, one of the directors, certainly affirms that it never entered into his contemplation to make a profit by the hay; but he admits that in a conversation, at which he was present, there was a talk about this trading, and some one said, "You had better not mention the hay, or it may make you liable to the bankrupt laws." I cannot, therefore, believe that he was so entirely without knowledge of the subject, as not to know that the profit on the hay had entered into the contemplation of the parties, when they commenced the concern. Besides, Clarke did not come in till long after Kirk, and after Westbrook had been engaged in it by himself for a twelve-month.

Now the first question is, whether Kirk, publishing this handbill, and acting in this way, buying and selling hay in large quantities, and Westbrook following in his steps, if it had stopped there, and the petitioning creditor's debt had then accrued against either of them, there could have been a question that they were dealers in hay. I believe no principle is more certain than this, that if a party is proved to be a trader, and he carries on trade, the continuance of that trade is to be presumed, unless the contrary be proved. That was determined in *Heanny v. Birch*. (b) So far from any contrary course being shown, the system here was identical. What Kirk had done in the first instance, and what Westbrook did, when he was alone in the market, was done subsequently, when the other directors were taken in. It is not assumed, or argued that any change took place in the buying and selling of this hay; the thing continued just as it had gone on up to that period. But Mr. Cooke says this trading was necessarily incidental, and sub-

(a) *Ubi supra*.

(b) 1 Rose, 356.; 3 Campb. 233. S. C.

siary to the establishment of the Islington Market, which was in prospect; and his proposition goes this length, that wherever there is an ulterior object, no matter if the wildest in the world, and one that turns out abortive, and a trading is carried on with a view to that object, such trading is protected, and is not within the operation of the bankrupt laws. The argument here is, that because these parties contemplated ultimately establishing a market, in which they did not succeed, to vie with and supersede Smithfield, they might carry on as many trades as they pleased with reference to that object, and not be within the meaning of the bankrupt laws. But that is not the true principle. Its extent has been very much discussed in the case of farmers, who frequently deal in articles quite *ultra* what they require for their farms; and in those cases they have been held to be within the operation of the bankrupt laws. In *Newland v. Bell* (a) (which I cite first on account of its importance, and because the editor has collected in a note all the cases of this kind), an officer in the army retired into the country, rented a dwelling-house and three acres of land, bought pigs, of which he consumed part in his own family, and sold the rest. He was held to be a trader, the smallness of the profit being no consideration, but one act of buying and selling being quite sufficient to constitute a trading. Now, who will say these parties did not buy with a view to a profit from the re-sale? The evidence of Eade, Kirk, and Westbrook, proves that they did so. Neither the deed, nor the prospectus of the company, makes any mention of the profit on the hay: there is nothing to show that the sale of hay was made indispensable, and incidental to the market, or lairage; the prospectus only says that the drovers shall have every accommodation. But it occurred to those gentlemen, that, besides the market, which they had in view, and which they thought would turn out immensely profitable, they would have an opportunity of buying and selling hay, and realising a large profit upon that. This was totally beside the market. It was not compulsory on the drovers to buy of them, and they were ready to sell to any body else, of course the principal buyers being the drovers, who came on Saturday nights. Therefore the case is entirely distinct from the principle laid down in *Ex parte Dering* (b), which governs the case of a farmer who, making the best of his land, and wishing to get the produce in a way most profitable to himself, may buy and sell an article with that view only. In *Stewart v. Ball* (c), a farmer had occasionally bought hay, but

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there the selling was accidental. Can it be said that the sale of hay in this case was an accidental occurrence? On the other hand, a constant dealing in hay was contemplated from the beginning, carried forward with a profit, and only discontinued, when the speculation was at an end. This bears no resemblance whatever to the case of *Bolton v. Sowerby* (a), which is another case of this kind, where it was sought to make a farmer and grazier a trader for dealing in hay, but unsuccessfully, because the hay was purchased for his cattle, and not to sell again.

Mr. Cooke placed great reliance on a case which has found its way into all the text-books, that of the schoolmaster, *Valentine v. Vaughan* (b); and it is singular how often we find a case uniformly referred to by the text writers, as establishing a principle, and on looking at the case itself, it turns out to be one of the most meagre, and from which it is scarcely possible to deduce any principle at all. It is laid down in all the text-books, that a schoolmaster who buys books for the use of his scholars only, is not a trader within the bankrupt law, and this case of *Valentine v. Vaughan* is referred to as the authority. In the report of this case, we are not told any particulars as to how the books were bought or sold, and it is simply added, "Lord *Kenyon* was of opinion that this was not a trading within the bankrupt law." Nothing could be shorter, or more unsatisfactory than that way of putting it. A very old case in Salkeld of *Newton v. Trigg* (c), has also been cited, for this reason, that there the Lord Chief Justice held, that "wherever a man buys and sells under a particular restraint and limitation, he is not a seller within the statute." Now, I am at a loss to understand the restraint, or limitation, under which this hay was bought, or sold. There was no order that they should deal with the drovers only. Mr. Clarke alleges that it never entered into his contemplation. Very likely not; but it entered into the minds of these people, that, in addition to their speculation, they could make a profit by selling hay. In that they were right. Two cases cited by Mr. *Bagley* appear to me to be very germane to this inquiry. One of them is the case of a boarding-house keeper, who took in lodgers, and supplied them with food and wine, and who was held to be a trader. I allude to *Smith v. Scott* (d) which was afterwards carried to the Exchequer Chamber, and the Court upheld the decision. (e) That case establishes the principle, that where

(a) *Ubi supra.*

(b) *Ubi supra.*

(c) Salk. 109.

(d) *Ubi supra.*

(e) *Ubi supra.*



there is a buying and selling distinct from the board and lodging, and it be done with a design to profit, that will bring a party within the operation of the bankrupt laws as an hotel-keeper; but the case is less strong than it would have been, had it not turned so much on the meaning of the words "hotel-keeper." But what was said by the Judges goes a great way to explain and enforce the principle I am attempting to lay down, which is, that if parties, having an ulterior object (no matter if they have or not) which proves abortive, think fit, in carrying out that object, to embark in trade, and carry on that trade without limitation or restraint, they are undoubtedly liable to the bankrupt laws. Here, it is quite clear to my mind, that the lairage was distinct from the sale of hay; that the sale of hay was commenced by Kirk with a view to a profit; that it was continued by Westbrook with the same view; and that it was subsequently continued by him in conjunction with the other directors. Under these circumstances, after reviewing all those cases, and hearing the arguments of the learned counsel, I have brought my mind to a very clear conclusion, that in each of these cases a trading has been established, sufficient to bring these parties within the operation of the bankrupt law, and therefore, I shall dismiss the petition in each case, and with costs. If the petitioner had confined himself simply to the question of trading, I should have thought that, as that was a question, which might very properly be discussed and reasoned on in Court, the general rule of the unsuccessful party paying the costs of the successful party ought not to apply. But as these petitions charge fraud, and are all implication and suspicion throughout, without a tittle of proof to sustain the charge, I shall give to the petitioning creditors their costs in each case, and reserve the costs of the assignees."

Application was then made for the discharge of the bankrupt Kirk, out of prison, under the 112th section of the Act.

Mr. *Cooke* opposed, on the ground that he could not be retaken in the event of the adjudication not being sustained.

After some discussion, it was agreed he should be discharged on entering into his own recognisance to the extent of 1000*l.*, to render himself back to custody in the event of the adjudication being set aside.

Solicitors, *G. & C. Smith; Lawrance, Plews, & Boyer; Harris; and Armstrong & Westbrook.*

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COURT FOR  
RELIEF OF  
INSOLVENT  
DEBTORS.

Nov. 11.

W., who occupied lodgings without the jurisdiction of this Court, having left them for a fortnight during the six months immediately preceding the date of his petition to visit a daughter, who resided within the jurisdiction, petitioned, under sect. 8., 10 & 11 Vict. c. 102., as a non-resident.—*Held*, that the visit to the daughter constituted no interruption of residence, and petition dismissed.

*Statement.*

## RE STEPHENS WILLIAMS. (a)

Before MR. COMMISSIONER PHILLIPS.

THIS insolvent, the incumbent of the parish of Magor, had petitioned under the protection statutes, and now appeared on his interim order. He had filed his petition under section 8. of 10 & 11 Vict. c. 102. as a non-resident. It appeared that for twelve months he had been residing in lodgings at Undy, in the county of Monmouth. In July of the present year, he had visited his daughter at Blackheath, where he remained for a fortnight. He had not relinquished his lodgings at Undy during this period, and he returned to them when he left Blackheath. Mr. Nicholls submitted that the petition must be dismissed. Section 6. of 10 & 11 Vict. c. 102. gave to this Court jurisdiction in all cases in which the insolvent shall have resided for six calendar months next immediately preceding the time of filing his petition within any parish, the distance whereof shall not exceed twenty miles; beyond that distance the County Court of the district had jurisdiction. Section 8. of the same statute provided against the contingency of an insolvent not having resided for the six months within either jurisdiction, and permitted him in such a case to file a petition in this Court. (b) Unless the visit to the daughter at Blackheath constituted a break of residence, it was quite clear this Court had no jurisdiction, and the insolvent ought to have applied to the County Court for relief. The alleged interruption was simply a trip of pleasure, with an admitted intention of returning to the lodgings at Undy, which were continued

(a) Reported by E. H. Reed, Esq.

(b) 10 & 11 Vict. c. 102. s. 6. enacts, *inter alia*, "That from the time this Act shall commence and take effect the Court for Relief of Insolvent Debtors in England, and the Commissioners thereof, and the Judges of the County Courts aforesaid, shall have jurisdiction in all matters of insolvency in manner following; that is to say, the said Court for the Relief of Insolvent Debtors, and the Commissioners thereof, in all cases in which the insolvent shall have resided for six calendar months next immediately preceding the time of filing his petition within any parish, the distance whereof, as measured by the nearest highway from the General Post Office in London to the parish church of such parish,

shall not exceed the distance of twenty miles, to which district the jurisdiction of the said Court and the Commissioners thereof is hereby restricted; and the said County Court in all cases wherein the insolvent shall have resided elsewhere." Sect. 8. provides, "That if any such insolvent shall not have so resided for six months in any one place as aforesaid, then he shall file his petition in the said Insolvent Debtors Court, and the jurisdiction aforesaid in the matter of such insolvency shall be vested either in the Court for Relief of Insolvent Debtors in London, or in such one of the said County Courts as the said Court for Relief of Insolvent Debtors shall direct."

for that purpose. The insolvent had returned to them, and there was no pretence for the allegation "that your petitioner has not resided for six calendar months next immediately preceding the time of filing his petition within the district of this Honourable Court; nor within the district of any County Court, &c."

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MR. COMMISSIONER PHILLIPS. The sole question here is, does a visit of an insolvent, who resides out of the district, to a sister, who resides in the district, for a week or fortnight, so interrupt his residence as to give this Court a jurisdiction in the case? It seems to me if I were to hold that it did, I should be going beyond all decisions on the subject. The petition must be dismissed. (a)

Judgment.

Attorneys, *Hutchinson ; Horwood.*

(a) Mr. Justice Storey, in his *Conflict of Laws*,<sup>1</sup> sect. 43., says, "That place is the domicile of a party where his habitation is fixed, without any present intention of removing therefrom." And again, sect. 44., "Two things must concur to constitute domicile, — first, residence; and, secondly, the intention of making it the home of the party. There must be *the fact and the intention.*" But it is not imperative that there should be an actual residence to retain a domicile once acquired; it is retained by *the mere intention to remain there permanently, and not to change it for another.* Therefore a temporary absence for the purposes of business or pleasure, or health, with an intention of returning, does not constitute in Law an interruption of residence. This principle was adopted by the Chief Commissioner in *Re William Snook*, 10 L. T. 350. The insolvent resided at Portsmouth; he had made an assignment which made it convenient for him to come occasionally to London, where he had lodgings upon these occasions. His petition was dismissed. He was absent for a temporary purpose from Portsmouth, and had no intention of remaining permanently in London.

The Court of Common Pleas recognised the same principle in *Nias v. Davies*, 9 L. T. 150., where it was laid down that it was sufficient to constitute residence within the meaning of the 5 & 6 Vict. c. 116. if the petitioner had, during the preceding twelve months, only been ab-

sent from the district for a temporary purpose, with the intention of returning, and had left his family in occupation of his dwelling-house within the district, even although he himself had for the last three or four months been a prisoner in a gaol in a different district.

*Coltman J.*, in delivering judgment, said, "It appears from the report of my brother *Erle*, before whom the case was tried (an action against the sheriff for an escape), that the prisoner was taken in custody at Presteign on the 10th of November, 1845, and that he had resided before that time in several places in Middlesex, Surrey, and London, for twelve months, occasionally absenting himself, but always with the intention of returning, and that he had lodgings kept on during all that time, down to March, 1846, where his wife lived, in the London district. Under that state of circumstances, it appears to us that, although absent for some temporary purpose from the London district at the time of his arrest, still it is clear that, in point of law, he must be considered as a resident in the London district, within which he had a permanent lodging, where his wife was residing, and to which it was his intention to return. The Commissioner, therefore, before whom he was brought had jurisdiction to act in the matter of his petition." *Vide Macrae's Insolv. Prac.* p. 100., where many valuable observations and cases on this subject are to be found.

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COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Sept. 26.

Where an insolvent is indebted in damages recovered against him in an action for trespass and false imprisonment, and the declaration shows a clear case for remand, the Court will refuse an application to admit to bail until the day of hearing.

Argument.

## RE HENRY WILLIAM LINDUS. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, an articulated clerk to a solicitor, applied to be admitted to bail until the day of hearing.

Mr. *Reed* opposed the application on behalf of the detaining creditor, on the ground of damages recovered against the insolvent in an action for trespass and false imprisonment. The declaration contained two counts, one for breaking and entering the dwelling-house of the plaintiff, and the other for a false imprisonment. On the first count the jury had awarded damages to the amount of 2*l.*, and on the second count they had awarded a sum of 20*l.* That would be a clear case against the insolvent at the day of hearing, and it was submitted, that under such circumstances he was not entitled to the indulgence of a discharge on bail.

Mr. *Dowse*, for the insolvent, called the attention of the Court to the 1 & 2 Vict. c. 110. s. 78. "That in case it shall appear to the said Court or Commissioner that such prisoner shall be indebted for damages recovered in any action for criminal conversation with the wife, or for seducing the daughter or servant of the plaintiff in such action, or for breach of promise of marriage made to the plaintiff in such action, or for damages recovered in any action for a malicious prosecution, or for libel, or for slander,"—he stopped there because the practice was to refuse bail in such cases; but in the cases next specified—"or in any other action for a malicious injury done to the plaintiff therein, or in any action of tort or trespass to the person or property of the plaintiff therein, where it shall appear to the satisfaction of the said Court that the injury complained of was malicious." It would be a matter for the Court to determine if the injury complained of was malicious, and, to ascertain that fact, it would be necessary to hear evidence which could not be gone into until the hearing. At present it only appeared that the insolvent was indebted in damages for a tort, and as the case was one that would require evidence to bring it within the section referred to, it was submitted that the insolvent was entitled to the indulgence of a discharge on bail.

Mr. *Reed* urged that the declaration which he put in was sufficient, as malice was distinctly laid. The second count was as follows:—"And for that the defendant assaulted and beat the plaintiff, and falsely and *maliciously*, and without any rea-

(a) Reported by E. H. Reed, Esq.

sonable or probable cause, gave him in custody to a policeman on a charge of felony, and caused him to be imprisoned in a police station, and to be afterwards taken before a metropolitan police magistrate, who, having heard the said charge, dismissed the same, and discharged the plaintiff out of custody; and the plaintiff claims 100*l*." The question, therefore, which the jury had considered was, Had the defendant maliciously and without any reasonable cause given the plaintiff into custody? That was the issue, and it was upon that issue that a verdict of 20*l*. had been recorded in favour of the plaintiff. The malice, therefore, of the imprisonment was already determined, and the Court was bound by the verdict of the jury.

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LINDUS.  
*Argument.*

MR. COMMISSIONER MURPHY. I think the reasons given are quite satisfactory. It is evident from the declaration, and the finding of the jury, that the imprisonment was malicious, and I shall refuse bail.

*Judgment.*

Attorneys, *Hare*; *Swan*.

## EXPARTE HARDING, RE HARDING. (a)

Before MR. COMMISSIONER GOULBURN.

THE adjudication in this case bore date 28th October, 1853. The notice to dispute was dated the 2nd November, and was as follows:—"Take notice that the above-named James Harding intends to dispute the adjudication of bankruptcy made against him." The 5th November was appointed for the hearing.

Mr. *Reed* now appeared to show cause.

A preliminary objection was taken by Mr. *Solomons* (Solicitor) on behalf of the petitioning creditor, to the form of the notice, on the ground, that the 14th Rule of Court (b), requiring

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BANKRUPTCY.

Nov. 5.

The notice to dispute an adjudication must specify distinctly the grounds upon which it is intended to proceed; and it is not sufficient in such notice to state generally the bankrupt's intention to show cause, &c., notwithstanding he intends to dispute the adjudication on every point.

Where the notice to show cause against the adjudica-

(a) Reported by A. A. Doria, Esq.

(b) If any person adjudged bankrupt intend to show cause against the validity of such adjudication, he shall cause notice in writing of such his intention to be served upon the petitioning creditor, or his solicitor, and upon the registrar, two clear

days at least before the day appointed by the Court for showing cause, and in such notice shall state which of the following matters, viz., the petitioning creditor's debt, the trading, or act of bankruptcy, he intends to dispute.

tion on the part of the bankrupt was served within the seven days allowed by the 104th section of the Bankrupt Law Consolidation Act, and on the day appointed for the hearing the case went off upon a technical objection to the form of the notice,—*Held*, on the authority of *Castelli's Case*, (1 De G. M. & G. 437.) that the bankrupt was in time within the meaning of this section; and, on application, the time for showing cause was enlarged, to allow the bankrupt to amend his notice.

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 {  
 EXPARTE  
 H. HARDING,  
 RE HARDING.  
 Argument.

the specific fact in dispute to be alleged in the notice, had not been complied with. The notice was deficient in this particular. Every ground of opposition intended to be relied on should have been set out in the notice.

Mr. *Reed* contended that this was unnecessary, where the bankrupt intended, as in this case, to put in issue every fact that had been alleged in support of the adjudication. Doubtless the object of the Rule was to inform the petitioning creditor of what he was expected to prove, and to save expense; and if the bankrupt intended to dispute only one of the facts necessary to constitute a bankruptcy, viz. the petitioning creditor's debt, the trading, or the act of bankruptcy, he must specify it in his notice. The force and meaning of the general notice was to bring every circumstance under the consideration of the Court. The notice is required only by the Rules; the Act is silent upon this point. This Court is bound to construe the Rules liberally, especially where a different construction might be productive of great hardship; and it is but reasonable that the bankrupt should have an opportunity of answering the allegations of the petitioning creditor which might or not be true or capable of explanation. We simply dispute what is alleged on the other side, and it can be no hardship to the petitioning creditor that we should be permitted to do so. Our notice extends to the whole proceeding: I submit, therefore, it is sufficient.

[Mr. Commissioner *Goulburn*. The Rules of Court have prescribed a certain mode of proceeding, which has not been complied with in this case. I do not accede to the proposition, that if you intend to dispute all the facts upon which the adjudication is built, you need not specify any. I think this a bare and insufficient notice.]

Mr. *Reed*. Then I pray the Court to extend the time under the 104th section of the Act (*a*), to enable us to amend our notice. This section gives the bankrupt seven days, or such extended time not exceeding fourteen days in the whole, from the service of the duplicate of the adjudication, to show cause. Our notice was served within the seven days. This day was fixed by the Court for the hearing on the application of the other side. It was not in our power to appoint an earlier day. Then, being served within the seven days, the notice, although insufficient for the purposes intended, was not altogether void. It was good as a beginning, and that is sufficient for my purpose. This was decided *In re Castelli* (*b*) by the Lords Justices.

(a) 12 & 13 Vict. c. 106.

(b) 1 De G. M. & Gor. 437.

Mr. *Solomons* (Solicitor) objected that the seven days had elapsed. It was not his fault that an earlier day was not fixed. He was not served until the 2nd November, and was obliged to give two clear days' notice of the day appointed for the hearing by the 14th Rule.

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EXPARTE  
HARDING,  
RE HARDING.  
*Argument.*

MR. COMMISSIONER GOULBURN. You may take an order to extend the time.

*Judgment.*

Solicitors, *G. J. Keene ; Solomons.*

## EXPARTE THE ASSIGNEES OF HOLLAND, IN RE HOLLAND. (a)

Before MR. COMMISSIONER EVANS.

COURT OF  
BANKRUPTCY.

Nov. 10.

MR. *Laurance* (Solicitor, of the firm of *Laurance, Plews, and Boyer*), on the part of the assignees, applied to the Court under the following circumstances:—The bankrupt, at the time of his adjudication, had a secret partner, but it having been decided that the partnership property and assets were in the order and disposition of the bankrupt, they were taken possession of by the official assignee, and administered under the bankruptcy, the partner coming in and proving for the amount of his share in the partnership business. All the creditors have been paid 20s. in the pound, but no dividend has as yet been paid to the partner. There being a surplus in the hands of the official assignee, the present application was for the direction of the Court, as to whether the solvent partner might receive a dividend out of the surplus before any interest should be paid to the several creditors, who have proved, under the 197th section of the Bankrupt Law Consolidation Act. (b) This section proposing to deal with the bankrupt only, and not recognising a partner, the question arises whether there is any substantial difference between the case of a partner who has proved and a creditor. He cited the cases of *Exparte Ogle* (c), and *Exparte Reeve* (d) there referred to.

In the case of a surplus remaining after the creditors have received 20s. in the pound, they are entitled to be paid interest upon their several debts, as against a secret partner of the bankrupt, who has proved, but received no dividend under the bankruptcy.

*Argument.*

(a) Reported by A. A. Doria, Esq.

(b) 12 & 13 Vict. c. 106. The 197th section is as follows:—"If the produce of the estate of any bankrupt shall be sufficient to pay 20s. in the pound, and interest, and to leave a surplus, the Court may order such surplus to be paid to such bankrupt, his executors, ad-

ministrators, or assigns; but such surplus shall not be paid until all the creditors, who have proved, shall have received interest upon their debts, to be calculated and paid" as therein mentioned.

(c) Mont. 350.

(d) 9 Ves. 590.

1853.

EXPARTE THE  
ASSIGNEES OF  
HOLLAND, IN  
RE HOLLAND.

*Judgment.*

Mr. *Desborough* (Solicitor, of the firm of Desborough, Young, and Desborough) appeared for the solvent partner.

MR. COMMISSIONER EVANS. This is a very hard case upon the solvent partner, but I am afraid I cannot help you. The creditors are entitled to interest upon their several debts in the first instance.

### IN RE JOHN JAMES. (a)

Before MR. COMMISSIONER HOLROYD.

COURT OF  
BANKRUPTCY.

*Nov. 24.*

This Court will not annul an adjudication, or order the advertisement in the *Gazette* to be stayed, on the mere ground of an arrangement having been entered into with the creditors, subsequent to such adjudication.

*Argument.*

THE petitioner in this case prayed for an order to supersede the adjudication in bankruptcy on proof of the usual requisites. The petition stated that the bankrupt had filed a declaration of insolvency, which constituted the act of bankruptcy, upon which he was adjudicated on the 16th November last; that subsequently all the creditors had agreed to accept a composition of 10s. in the pound, and had executed a release of their several debts, &c., on payment of this composition, in consideration of which they consented that the adjudication should be annulled.

Mr. *Lawrance* (Solicitor), in support of the petition, cited *Wortley's Case* (b) before the Vice-Chancellor, sitting in bankruptcy. He contended that the creditors had a perfect right to accept the composition, and give the release; and that, having done so, there was no creditor to prosecute the adjudication. Here the deed of release was between the bankrupt, of the first part, his brother, who paid the composition, of the second part, and the creditors, who should come in and execute, &c., of the third part, and the signatures of the several creditors were verified by affidavit. [Mr. Commissioner *Holroyd*. I have always understood the practice to be adverse to what you now ask me to do.] I ask to annul the adjudication at once. [Mr. Commissioner *Holroyd*. That cannot be done until after the choice of assignees.] I apprehend it may be done at once. In this case there is no creditor to prove. Clearly the old practice was, that no fiat could be superseded till after the second sitting, which was for the choice of assignees, and these are now, by the late Act, chosen at the first sitting. [Mr. Commissioner *Holroyd*. All the cases are against you.] Then I ask that the Court will

(a) Reported by A. A. Doria, Esq.

(b) *Cor. Goulburn C.*, 9th March, sitting in bankruptcy, on the 17th 1850. This bankruptcy was carried April following, and was superseded on appeal to V. C. *Knight Bruce*.



stay the advertisement, until the official assignee can satisfy himself of the truth of the bankrupt's representations. There is a creditor's ledger, containing the names of all the creditors, from which the bankrupt's statements can be verified.

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IN RE JOHN  
JAMES.

MR. COMMISSIONER HOLROYD. The question is, what ought to be done on public grounds? I am asked to do something simply on the ground that some arrangement or other is going on. I do not find any instance of the kind, where the order was granted, unless there was a probability of the adjudication being upset. It appears to me that, sitting in bankruptcy, I have no authority to make the order, or to interfere between the adjudication and the advertisement. The order will be, that this Court is not justified in annulling the adjudication, nor in granting an order to stay the advertisement in the *London Gazette*.

*Judgment.*

Petition to annul dismissed, and application to stay the advertisement refused.

## EXPARTE MARRIOTT, IN RE MARRIOTT. (a)

Before MR. COMMISSIONER EVANS.

COURT OF  
BANKRUPTCY.  
Nov. 29.

THIS was an application, under section 195. of the Act of 1849 (b), for an allowance to the bankrupt of 10*l.* per cent., on the ground that his estate was able to pay 15*s.* in the pound. There was, in fact, sufficient to pay 20*s.* in the pound, and the costs of the adjudication, but not sufficient to pay interest to the creditors, who had proved, upon their several debts. (c) This application became necessary, by reason that no provision was made by the 195th section for an allowance, where the estate was sufficient to pay 20*s.* in the pound; the words of the section extending no further than where the estate should pay 15*s.* in the pound.

The bankrupt's estate being sufficient to pay 20*s.* in the pound, he is entitled to an allowance of 10*l.* per cent. under the 195th section of the Bankrupt Law Consolidation Act.

*Statement.*

Mr. *Lawrance* (Solicitor), in support of the application, cited *Exparte Morris* (d) and Lord Henley's *Bankrupt Laws*. (e)

*Argument.*

Mr. *Linklater* (Solicitor) appeared for the assignees.

MR. COMMISSIONER EVANS. This does not appear to be a question between the bankrupt and the creditors claiming interest. You may take the order.

*Judgment.*

Ordered accordingly.

(a) Reported by A. A. Doria, Esq.

(b) 12 & 13 Vict. c. 106.

(d) 1 Ves. 132.

(c) See sect. 197.

(e) Page 391.

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COURT OF  
BANKRUPTCY.

Nov. 29.

Dec. 1.

Notice to an assurance office of deposit of a life policy need not be in writing: a verbal notice is sufficient.

The taking possession by the equitable mortgagee may be at any time before actual bankruptcy.

Statement.

## EXPARTE TANNER, IN RE BROCK. (a)

Before MR. COMMISSIONER EVANS.

THIS was a special case for the opinion of the Court, and was as follows: —

In February, 1852, Tanner advanced 222*l.* to the bankrupt on his note of hand, and the deposit of a policy of assurance on the bankrupt's life for 600*l.*, in the Westminster Life Assurance Association. On the 16th April 1853, Tanner, through his attorney, paid a half year's premium on the policy, and at the same time gave verbal notice to the actuary, that he, Tanner, held the policy as equitable mortgagee; the bankrupt having already committed an act of bankruptcy, of which, however, Tanner had no notice. The bankrupt was taken in execution at the suit of a third party, and remained in prison for twenty-one days, and this constituted the act of bankruptcy, upon which he was adjudicated bankrupt on the 6th of June. Tanner had notice of the bankrupt being in custody, and, subsequently, on the 31st of May, gave notice in writing to the actuary of the assurance company of the equitable deposit of the bankrupt's policy. Tanner having tendered a proof to the assignees, the question arose as to whether the policy, under the above circumstances, passed to the assignees, or remained an available security in the hands of Tanner.

Judgment.

MR. COMMISSIONER EVANS. At the time of the notice to the assurance company, in April, Mr. Tanner had no notice of an act of bankruptcy having been committed. I am of opinion that this was a good notice to the office, and that it need not be in writing: *Re Raihes*. (b) The taking possession may be at any time before the actual bankruptcy. (c)

Solicitors, *Patten*; and *O. Richards*.

(a) Reported by A. A. Doria, Esq.

(b) 4 Dea. &amp; Ch. 412.

& R. 516.; *Young v. Hope*, 2 Exch.

(c) 12 &amp; 13 Vict. c. 106. s. 125.

105.; *Manley v. Boycot*, 1 Com. L.And see *Pariente v. Pennell*, 2 Moo.

Rep. 273.

COURT OF  
BANKRUPTCY.

Aug. 29.

Dec. 7.

F., the holder of an accommodation bill of exchange drawn by W.,

## EXPARTE FREW, IN RE BLACK AND COPE. (d)

Before MR. COMMISSIONER FONBLANQUE.

THIS was a claim by Frew, the holder of a bill of exchange, drawn by one Wilson, of Glasgow, and accepted for his accom-

(d) Reported by A. A. Doria, Esq.

modation by Black, with the knowledge of his partner, and endorsed by Wilson to the holder, to prove against the joint estate for the amount, less a composition of 8s. in the pound, which had been paid by Wilson, under a deed of composition with his creditors, to Frew, in respect of such bill.

Mr. *Plews* (Solicitor, of the firm of Lawrance, Plews, & Boyer), in support of the application, contended, that at the time Frew parted with his money, he did not know it was an accommodation bill, and cited *Byles on Bills* (a), and *Rees v. Berrington*. (b)

Mr. *Hollums* (Solicitor, of the firm of Martins, Thomas, & Hollums), on behalf of the assignees, objected, 1st, That this was a bill for the accommodation of Wilson, and accepted by Black without his partner's consent, and therefore fraudulent; and, 2ndly, That, inasmuch as Frew had accepted the composition from Wilson, he had thereby discharged the acceptors. He cited *Story on Bills* (c) and the cases there referred to.

The following cases were also cited: *Mallet v. Thompson* (d), *Lazton v. Peat* (e), *Raggett v. Axmore* (f), *Kerrison v. Cooke* (g), *Collett v. Haigh* (h), *Fentum v. Pocock* (i), *Carstairs v. Rolleston* (k), *Bank of Ireland v. Beresford* (l), *Exparte Glendinning* (m), *Price v. Edmunds* (n), *Yallop v. Ebers* (o), *Nicholls v. Norris* (p), *Hall v. Wilcox* (q), *Harrison v. Courtauld* (r), and *Farquhar v. Southey*. (s)

MR. COMMISSIONER FONBLANQUE. I must look into the cases. As to the circumstance that this bill was fraudulent, I do not think that is made out; there has been, at least, acquiescence on the part of Cope for Black to accept bills.

HIS HONOUR now gave judgment as follows:—This bankruptcy has arisen out of the mischievous system of accommodation bills, which the Commissioners of this Court have taken so many opportunities of denouncing. The bankrupts, who were but in a small way of business, accepted largely for the accommodation of Wilson, who failed, and compounded with his creditors. Black and Cope became bankrupts. The party, whose claim I have now to deal with, Mr. Frew, is the holder

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EXPARTE  
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and accepted by B. with the knowledge of his partner C., and endorsed by W. over to F. for value. F. accepts a composition from W. in respect of this bill. B. and C. become bankrupt. — *Held*, the bill was not fraudulent as regarded C. — *Held*, also, that F. was entitled to prove against the joint estate of B. & C. for the amount, less the composition.

Argument.

Dec. 7.  
Judgment.

- (a) 5th edit. (1847), p. 180.
- (b) 2 Ves. 540.; 2 Tudor's Leading Cases in Equity, 707. S. C.
- (c) 3rd edit. (1853), p. 565. s. 432.
- (d) 5 Esp. 178.
- (e) 2 Camp. 185.
- (f) 4 Taunt. 730.
- (g) 3 Camp. 362.
- (h) 3 Camp. 281.

- (i) 5 Taunt. 192.
- (k) 5 Taunt. 551.
- (l) 6 Dow. 233.
- (m) Buck. 517.
- (n) 10 B. & C. 578.
- (o) 1 B. & A. 698.
- (p) 3 B. & A. 41.
- (q) 1 Moo. & R. 58.
- (r) 3 B. & A. 36.
- (s) 1 Moo. & M. 14.

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of one of these bills drawn by Wilson, accepted by the bankrupts for his (Wilson's) accommodation, and endorsed by him to the holder.

The facts of the case are admitted, and the question which arises is, whether the rule in Equity, in respect to compositions with the acceptors of accommodation bills, differs from the rule at Common Law, viz., that such composition discharges the sureties. In support of the distinction, the leading case is *Ex parte Glendinning* (a), decided by Lord Eldon, in 1819, in conformity with his previous judgment, when Chief Justice of the Common Pleas, in *Laxton v. Peat*. (b) The judgment of Lord Eldon is peculiar. It commences by stating that he remembers "when, for the first time, Courts of Law decided, that where there was an acceptor without effects, notice of dishonour of the bill need not be given to the drawer;" and, carrying out that distinction, he goes on to say, "The practice is now quite familiar in these Courts, where the endorsee, with notice of the accommodation transaction, has recovered upon the acceptance, to allow the acceptor to prove for the amount under the drawer's commission. I think this equity naturally grew out of the doctrine of not requiring notice to be given, when the acceptor had no effects. Although no man more than myself laments the introduction of that doctrine, yet I cannot overturn what has been for so many years acknowledged and acted upon as part of the general mercantile law of the country." The other points in the judgment go upon the collateral question, whether parol evidence could be let in to vary the implied contract. Now, it would seem that Lord Eldon does not rely upon the soundness of the doctrine, but simply upon his finding it so established.

Between the decision of the case of *Laxton v. Peat* and that of *Ex parte Glendinning*, there had been several cases at Common Law, the principal of which was *Fentum v. Pocock* (c), in which Sir James Mansfield, Chief Justice, supported the authority of Sir Vicary Gibbs, that *Laxton v. Peat* was not law; and to this doctrine Lord Eldon himself seems ultimately to have assented; for in a case before the House of Lords of the *Governor and Directors of the Bank of Ireland v. Beresford and others* (d), though he complained that the Common Law Judges had taken little notice of the decisions in Equity, he appears to have assented finally to the doctrine laid down in *Fentum v. Pocock*, supported by the authority of Sir J. Mansfield, Sir V. Gibbs, and the Puisne Judges of that day.

(a) *Ubi supra*.

(b) *Ubi supra*.

(c) *Ubi supra*.

(d) *Ubi supra*.

Notwithstanding this, however, it does seem that *Exparte Glendinning* continued to be regarded as an authority in Equity, and especially, being a Bankruptcy report, as the authority for the guidance of the Equity jurisdiction in that branch of the law. But some time about the year 1831 or 1832, the then *Master of the Rolls* appears to have doubted the soundness of the distinction in Equity, and, therefore (and in fact it could be with no other view than that stated by the counsel in the case) he sent *Harrison v. Courtauld* (a) for the opinion of the Court of King's Bench, in order to determine whether *Fentum v. Pocock* was still held to be law. I have derived considerable assistance from having been furnished with a list of the authorities cited in the course of the argument in that case. The result was that all the Common Law Judges, including Lord *Tenterden*, with *Parke*, *Taunton*, and *Patteson*, Justices, concurred with Lord *Ellenborough*, Sir *J. Mansfield* (who was also a very considerable authority in Equity), and Sir *V. Gibbs*, in overruling *Laxton v. Peat*, and supporting *Fentum v. Pocock*; and, by the certificate of the Judges, they confirmed the decision.

If the matter had rested there, I should certainly have come to the conclusion that the authority of *Exparte Glendinning* would follow the overruling of the case of *Laxton v. Peat*, and therefore, that it should be held without distinction in Law and Equity, that giving time to the acceptor, whether an acceptor for value, or an accommodation acceptor, discharged the drawer and the other parties to the bill. A more recent case of *Manley v. Boycot* (b) seems to confirm this view beyond dispute. The case of *Smith v. James* (c) is there cited in a note, to which is appended a very long list of authorities, on which the Judges were decidedly of opinion that *Fentum v. Pocock* was law, and that *Laxton v. Peat* was not. In *Smith v. James* all the Judges concurred in saying that the case could not be distinguished from *Harrison v. Courtauld*.

I think, therefore, that this last case puts an end to all question; and holding that *equitas sequitur legem* is a good maxim, and most especially so in dealing with negotiable securities, which are not only matters concerning persons of this country, who may be more accustomed to the subtleties of our law, but also concerning all nations dealing with us, I think that the greater simplicity, and the less technical distinction there is respecting such transactions the better. Sir *Vicary Gibbs*, in his judgment in *Kerrison v. Cooke* (d), and the other Judges, in various parts of their judgments in the cases referred

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(a) *Ubi supra*.

(b) 1 Com. L. Rep. 273.

(c) 2 Ell. & Bl. 50. (n).

(d) *Ubi supra*.

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 COPE.  
*Judgment.*

to, have all concurred in reprobating accommodation bills. Sir *V. Gibbs*, in *Kerrison v. Cooke*, says, "I am sorry that the term 'accommodation bill' ever found its way into the law, or that parties were allowed thus to get rid of the obligations they professed to contract, by putting their names to negotiable securities."

In that opinion I am quite convinced that all persons who are connected with the practice of this Court, and have witnessed the mischievous effects of the system, will fully concur. Adopting that principle, and relying on the authorities I have cited, I must hold that the same rule which is established at Law, exists also in Equity, viz., that time given to, or a composition accepted from, the principal debtor alone discharges the sureties; and that the fiction which would make the drawer the principal, when the bill has not been drawn for value, has no sound foundation in Law. In this case it is the drawer who has compounded; therefore the holder, who is the endorsee of the bankrupts (the acceptors), is entitled to prove.

Proof admitted accordingly.

### EXPARTE THE ROYAL BRITISH BANK OF SCOTLAND, IN RE OKELL. (a)

COURT OF  
 BANKRUPTCY.

Before MR. COMMISSIONER FONBLANQUE.

Dec. 16.

Certain bills of exchange, purporting to be drawn at Stettin, were addressed to and accepted by H., a member of, and on account of, the firm of M. & Co., and endorsed by the bankrupt, also a member of the firm, to S., for value. On the bankruptcy of H., S. proved against his estate in respect of these bills. — *Held*, he was not entitled to prove upon the same bills as against the bankrupt's estate, notwithstanding he had no notice that the bankrupt was a member of the firm of M. & Co.

MR. *PULLING* for the Royal Bank of Scotland. The bank claims to prove upon five bills of exchange drawn by one Kluge, at Stettin, and addressed to, and accepted by one Hertslett, a member of the firm of Moberly and Company, on account of the firm, and endorsed by the bankrupt to the bank, who discounted them in the usual course of business. The firm of Moberly and Company consisted only of the bankrupt and Hertslett, and on the bankruptcy of the latter, proof was made upon these bills as against him. We now claim to prove against Okell, as the endorser, and the simple question is, whether, under the circumstances, we are entitled to double proof.

It is objected that we are not entitled on the authority of *Exparte Moulton*. (b) Previously to this case the point appeared clearly established by very many cases, and amongst others by

(a) Reported by A. A. Doria, Esq.

(b) 1 D. & Ch. 44.; S. C. 2 Ibid. 419.; S. C. Mont. 321.; S. C. Mont. & B. 28.

*Exparte Bonbonus* (a), cited in *Exparte Hinton*. (b) The question pressed upon the Court in *Exparte Moulton* was, that though there was no express notice, there were other circumstances to induce the world to believe that the parties to the bill were in partnership; and the Court was divided in opinion as to whether double proof should be allowed, the Chief Judge *Erskine* and Sir *George Rose* being against the proof, and Sir *A. Pell* and Sir *J. Cross* in favour of it; so that, as far as it goes, this case left the question open. It was then carried to the Lord Chancellor (Lord *Brougham*) on appeal by way of special case (c); and after an elaborate argument, his Lordship entirely relied on his decision in *Exparte Husbands* (d), on the apparent assumption that the rule had been acted upon for a length of time, so as to have acquired the force of a statutory enactment.

Now, the case of *Exparte Husbands* really lays down no such law as was assumed to be laid down by it in *Exparte Moulton*. How has it been treated in more modern times? In *Exparte Hinton* (e) three partners, of a firm of six, carried on a distinct trade in partnership, and endorsed a promissory note made by all, which was discounted by a person who believed at the time that the three were partners in the aggregate firm, but that the firms were distinct, and it was held not a case for double proof. There the Lord Justice *Knight Bruce* (then Vice-Chancellor), an acknowledged authority on bankruptcy law, concurred entirely in my view of *Exparte Moulton*, and said that the decision of Lord *Brougham* was contrary to the law before that case, and cited seven cases, which are collected in a very learned note to *Montague and Ayrton's Treatise on Bankruptcy*. (f) Then we have the solemn opinion of Lord *Eldon*, that, up to the time of *Exparte Husband*, the law by universal consent was, that, where there was no knowledge on the part of the holder of a bill of the drawer and acceptor being members of the same firm, that is, if he believed them to be different parties, double proof might be allowed. Then came *Exparte Husbands*, which has been so ingeniously misunderstood, and used in *Exparte Moulton*, to bring about the present unsatisfactory state of the law under which we claim to prove.

Mr. *Aspland*, for the assignees, objected to the double proof. He said that the allegation that but for the decision in *Exparte Moulton* (g) the authorities would have been all one way, was unfounded, for that there were *dicta* and decisions of Lord

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THE ROYAL  
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Argument.

(a) 8 Ves. 540

(b) 1 De G. 550.

(c) 2 Gl. &amp; J. 4.; S. C. 5 Madd. 419.

(d) 2 D. &amp; Ch. 419.

(e) *Ubi supra*.

(f) Vol. i. p. 162.

(g) *Ubi supra*.

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 EXPARTE  
 THE ROYAL  
 BRITISH BANK  
 OF SCOTLAND,  
 IN RE OKELL.  
*Argument.*

*Eldon*, showing most conclusively that he would have refused double proof in this case. This was clear both upon authority and principle. Assuming that Okell was not known to be a partner in the firm of Moberly and Company until his bankruptcy, it by no means followed that double proof would be admitted. The creditors might either stand upon what appeared to be the contract, or they might elect against which estate they would prove, and, taking advantage of Okell being a real partner, hold him liable; but in that case they must do so with all consequences. If, on the contrary they would not consider him a partner, as they have a right to do, they might reserve their right to prove against his estate in the event of the assets being insufficient. This was the case of *Exparte Husbands*, in which the *Lord Chancellor* decided that the creditor might stand upon the apparent contract, and prove against the estate of both. He cited *Exparte Masson* (a), *Exparte Liddel* (b), *Exparte the Bank of England* (c), *Exparte Soper* (d), and *Exparte Chevalier*. (e) [Mr. Commissioner *Fonblanque*. This last case goes a great way. It not only declares a principle as established here, but applies it in restraint of the foreign jurisdiction.] He also referred to *Deacon's Bankruptcy Law* (f), and *Collier on Partnership* (g); and contended that the case of *Exparte Hinton* (h), cited on the other side, was very strong in his favour, as showing that Vice-Chancellor *Knight Bruce* felt himself bound by the decision in *Exparte Husbands*, however much he might disapprove of it.

Mr. *Pulling* replied. This is not like the case of a joint and several bond, where the parties necessarily have notice of the true obligors. If a man be ignorant of the drawer of a bill being a member of the firm of the acceptor at the time, he could not have made his election, and therefore is not prejudiced. All the cases prior to *Exparte Moulton* (i) proceeded upon the assumption that the creditor had elected. In *Exparte Chevalier* (k) the question of notice, on the contrary, was not raised. There the party had express notice as to who was the member of the firm. [Mr. Commissioner *Fonblanque*. It shows the strong disinclination of the Court against the double proof; not only would it not be allowed here, but not also elsewhere.] But if the holder of a bill, or a party dealing with these parties have no such notice, there is no ground for supporting the doctrine laid down by the Court, whose object is to prevent parties

(a) 1 Rose, 159  
 (b) 2 Rose, 34.  
 (c) 2 Rose, 82.  
 (d) 4 D. & Ch. 569.  
 (e) 1 M. & Ayr. 345.

(f) De Gex, vol. i. p. 711.  
 (g) 1st edit. p. 547.  
 (h) *Ubi supra*.  
 (i) *Ubi supra*.  
 (k) *Ubi supra*.



conniving at a fraud, and receiving double dividends. There is nothing in this case suggestive of fraud, the bills having been discounted in the ordinary course of business.

1853.  
EXPARTE  
THE ROYAL  
BRITISH BANK  
OF SCOTLAND,  
IN RE OKELL.  
*Judgment.*

MR. COMMISSIONER FONBLANQUE. As I have very recently had occasion to look into this case of *Exparte Moulton* (a), I feel myself in a position to pronounce my opinion at once, without any delay in order to consult further authorities.

It seems to me that I am bound to take the same course as Sir J. L. Knight Bruce (then Vice-Chancellor) took in the case of *Exparte Hinton*. (b) Whatever may be my opinion of previous cases I find the law established, and am bound to follow it. Certainly, if the thing had been a matter of first impression, I should have been rather better inclined to follow the reasoning of Sir A. Pell and of Sir J. Cross than that of the Chief Judge Erskine and Sir George Rose, though I have deference for their opinions also. But as Sir A. Pell and Sir John Cross both failed to convince the then Lord Chancellor, I can do no other than say, that I consider that the decision in *Exparte Moulton* binds me; and I must accordingly reject the claim of these parties to prove against the estate of Okell, they having already proved against the other estate.

Mr. Aspland. That was by arrangement; it was done to raise the question.

Mr. Reed. We do not object to their having their election; but the proofs were admitted against Hertslett's estate in the first instance, because we did not see how otherwise the matter could be well brought before the Court.

MR. COMMISSIONER FONBLANQUE. The proofs of those whose election has been made must be rejected: those who have not already proved will have the right of election. It may be that parties, who have already proved, might have the right of withdrawing their proofs. My judgment then will be, in conformity with *Exparte Moulton*, to reject the double proof.

Proof rejected accordingly.

Solicitors, A. Gordon & Son; and Reed, Langford, & Marsden.

(a) *Ubi supra.*

(b) *Ubi supra.*

1853.

COURT OF  
BANKRUPTCY.

Dec. 20.

This Court will not interfere, or order the discharge out of custody, of a bankrupt, who, being a prisoner for debt, has incurred a contempt of the Insolvent Debtors' Court, for neglecting to file his schedule in that Court, on the ground that his remaining in custody is entirely of his own seeking.

Statement.

Argument.

## EXPARTE OLIVER, IN RE OLIVER. (a)

Before MR. COMMISSIONER HOLROYD.

THE bankrupt was arrested on the 5th July, 1853, upon a *ca. sa.* issuing upon a judgment obtained by one Jones in an action in the Court of Common Pleas, and committed to the Queen's Prison. On the 11th August Jones applied by petition to the Court for the Relief of Insolvent Debtors, under section 36. of the statute 1 & 2 Vict. c. 110., for the usual order to vest the estate and effects of the debtor in the provisional assignee of that Court. The order was made on the 12th; and served on Oliver in prison on the 15th. By the terms of the order he was required to file his schedule within fourteen days from the service thereof. On the day appointed for showing cause Oliver appeared in person, and requested further time to prepare his schedule, whereupon a fortnight was allowed him for that purpose. A further adjournment took place for a week, and no schedule having been filed, Jones was, on the 26th November, appointed creditors' assignee, and as such took possession of the estate and effects of the insolvent on the 29th.

On the 28th November a petition for adjudication was filed in this Court against Oliver, upon which he was adjudicated bankrupt the same day; and on the following day the messenger of the Court went down to take possession under the bankruptcy.

This being the day appointed for the choice of assignees,

Mr. *Linklater* (Solicitor), for the bankrupt, applied for his discharge out of custody, under section 112. of the Bankrupt Law Consolidation Act.

Mr. *Nicholls*, on behalf of Jones and other creditors, opposed the application. The effect of the order of the 12th August was to vest in the provisional assignee of the Insolvent Debtors' Court all the estate of the debtor, until his discharge out of custody. By the petition and the vesting order that Court has acquired a jurisdiction. By the appointment of the creditors' assignee all the debtor's estate vested in such assignee, and the question now before the Court is, whether the subsequent bankruptcy has divested such estate out of the creditors' assignee, and vested it in the official assignee of this Court. My objection is threefold: 1. The bankrupt does not bring himself within the 112th section, the last proviso of which entirely ex-

cludes him from its operation. (a) A creditor cannot apply to the Insolvent Debtors' Court at all under the statute 1 & 2 Vict. c. 110., until the debtor has been in prison twenty-one days. (b) The vesting order having been made, the prisoner was in contempt for not filing his schedule within the time allowed for that purpose. By the vesting order the creditor has acquired a right to have such schedule filed, and that the debtor should give up all his property. If, therefore, this Court now release him, my clients are deprived of their rights, inasmuch as such release will operate as a release to Oliver of his obligations to the Insolvent Debtors' Court. That Court has no jurisdiction to compel the debtor to disclose his property; it can only make the order for him to file his schedule. By the 38th section of 1 & 2 Vict. c. 110. every debtor, upon his own petition, under this Act, must be in actual custody within the walls of the prison during all the time of the proceedings in the Insolvent Debtors' Court. The same words are not used in any part of the statute where the petition is by a creditor; but practically it is the same, for the debtor is generally brought up in custody of the gaoler, unless he is out on bail.

Secondly. Being in contempt and in custody, this Court will not release the debtor from the consequences of such contempt. The power granted by the 112th section is a discretionary power, and no Court of competent jurisdiction, in the exercise of such a power, will discharge the order of another Court. The last proviso of the 112th section appears to have been framed with reference to the practice of the Insolvent Debtors' Court, by the introduction of the words "*being in custody for any debt contracted by fraud or breach of trust,*" &c. It would seem that fraud has been made out against the debtor for not complying with the order of the Insolvent Debtors' Court.

(a) 12 & 13 Vict. c. 106. s. 112. The third clause of this section enacts, "That where any person who has been adjudged bankrupt, and has surrendered and obtained protection from arrest, is in prison or in custody for debt at the time of his obtaining such protection, the Court may, except in the cases next hereinafter mentioned, order his immediate release, either absolutely or upon such conditions as it shall think fit." Then comes the proviso, "Provided always, that the Court shall not order such release where it shall appear by any judgment, order, commitment, or sentence, under which the bankrupt is in prison

or in custody, or by the record or entry of any such judgment, order, commitment, or sentence, and the pleadings or proceedings previously thereto, that he is in prison or custody for any debt contracted by fraud or breach of trust," &c. The last proviso is, "Provided also, that such release shall in nowise affect any rights of the creditor, at whose suit the bankrupt may be in prison or in custody, against the bankrupt, except the right of detaining him in prison or in custody whilst protected from imprisonment by order of the Court."

(b) Sect. 36.

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OLIVER, IN RE  
OLIVER.  
*Argument.*

1853.  
 EXPARTE  
 OLIVER, IN RE  
 OLIVER.  
*Argument.*

Thirdly. The exercise of this discretionary power would operate with peculiar hardship upon the creditors. No corresponding benefit can accrue to them, because no property can pass to them under the insolvency. There is no jurisdiction under the 74th section (a) to transfer the estate from the provisional assignee in insolvency to the official assignee in bankruptcy. This section corresponds with the 39th section (b) of the stat. 1 & 2 Vict. c. 110., and both sections require the petition for adjudication to be filed within two months from the vesting order. The 39th section is divisible into four parts. The first relates to the act of the party; the second to proceedings on his part, and not to any taken on the part of the creditor between the time appointed for the vesting order and the hearing, *that is* about six weeks. The third and fourth relate to a proceeding on the part of a creditor. We say this is limited to two months, so that any proceeding taken in this Court with a view of destroying the effect of the proceedings in insolvency must be within the two months prescribed by the Act. But in this case more than two months have elapsed between the vesting order and the petition for adjudication in bankruptcy. The estate of the bankrupt therefore not being divested out of the provisional assignee, there is nothing for distribution in this Court, and consequently this bankruptcy cannot be supported.

I am instructed also to apply for a short adjournment of the choice of assignees, in order to consult with my clients, on the ground that the first notice they had of the proceedings in this Court was, when the messenger went to take possession. They have made an affidavit of their belief that the trading cannot be supported. I submit, therefore, under all the circumstances, that the choice of assignees should not be confirmed to-day.

(a) 12 & 13 Vict. c. 106.

(b) By the 39th section it is enacted, "That the filing of the petition of every person in actual custody who shall be subject to the laws concerning bankrupts, and who shall apply by petition to the Insolvent Debtors' Court for his discharge from custody according to this Act, shall be accounted and adjudged an act of bankruptcy from the time of filing such petition; and that any fiat in bankruptcy issuing against such person, and under which he shall be declared bankrupt, before the time appointed by the said Court, and advertised in the *London Gazette*, for such prisoner to be brought up to be dealt with according to this Act, or at any time within two calendar months from the time of

making any such order as aforesaid, whether upon the petition of such prisoner, or of any such creditor as aforesaid, shall have the effect of divesting the real and personal estate and effects of such person out of the provisional assignee: Provided always, that the filing of such petition shall not be deemed an act of bankruptcy, unless such person be so declared bankrupt before the time so advertised as aforesaid, or within such two months as aforesaid; but that every such order as aforesaid shall be good and valid, notwithstanding any fiat in bankruptcy under which such person shall be declared bankrupt after the time so advertised as aforesaid, and after the expiration of such two calendar months as aforesaid."

Mr. *Lawrance* (Solicitor) also opposed the bankrupt's discharge on behalf of another creditor, who is a creditor for costs incurred in a Chancery suit, and in respect of which the bankrupt is detained in custody. Apart from the circumstances already before the Court, if a debtor have vexatiously put his creditors to expense, he is not entitled to any indulgence. This 112th section was introduced into the Bankrupt Law Consolidation Act confessedly to save expense, and to enable assignees to have direct communication with the bankrupt debtor, whom, however, it was in no way intended to benefit. Here the debtor has lain in prison for months, and is in contempt of another Court; and this Court will undoubtedly recognise the proceedings of that Court.

Mr. *Linclater* (Solicitor) replied. No impropriety on the part of the bankrupt has been made out. The construction put upon the 74th section cannot be supported. The petition was filed before the time appointed by the Insolvent Debtors' Court for the hearing: no time has been appointed by that Court for the bankrupt's discharge, and it is only after two months from that time that the filing of the petition ceases to be an act of bankruptcy. There is no authority for saying he is not entitled to his discharge by reason of his being in contempt of the proceedings of another Court. There is no rule to oblige the bankrupt to file his schedule in the Insolvent Debtor's Court, if he or his creditors preferred he should pass through the ordeal of this Court. It cannot be supposed that the Legislature contemplated he should go through the double process of insolvency and bankruptcy, and there is no reason to compel him to do so. His neglect to file his schedule has been to his own cost, and for that he has suffered a long imprisonment. No attempt has been made to make him chargeable with any of the offences enumerated in the exceptional clause of the 112th section. Moreover, he has given up to the official assignee money and shares to a considerable amount. I submit, therefore, he is entitled to his discharge, on undertaking to render his services to the assignees in making out the accounts.

[Mr. COMMISSIONER HOLROYD. If I understand this question aright, if a party neglect to file his schedule in the Court for the Relief of Insolvent Debtors there are no means of obtaining a hearing.]

Mr. *Nicholls*. That is so: if a debtor do not file his schedule, he is in contempt; and, as by the rules he must be in prison during the whole of the proceedings until the final order for his discharge, he cannot in such case obtain his discharge; so

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EXPARTE  
OLIVER, IN RE  
OLIVER.  
*Argument.*

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 EXPARTE  
 OLIVER, IN RE  
 OLIVER.  
*Judgment.*

that the only effect of not filing his schedule is that he continues in custody of his own act.

MR. COMMISSIONER HOLROYD. He would thus constitute himself his own gaoler. I think under these circumstances I ought not to order his discharge, as it appears that a nice question must arise under the 74th section, as to the extent of the law when applied to a case of this kind. There are now two courses of proceeding in the two Courts. I think, therefore, I ought not now to prejudge this question. It is sufficient to say that there is a proceeding pending in the Insolvent Debtors' Court, and that the bankrupt is in contempt of that Court; that he has chosen to lie in prison; that it is uncertain in which Court the proceedings should be prosecuted, and not at all clear that there will be anything to distribute in this Court.

It is very difficult, from the language of the 74th section, to say whether the Legislature contemplated this section to apply to cases like the one now before the Court.'

Under all the circumstances, therefore, I am of opinion, that the bankrupt, being in contempt of the Court for the Relief of Insolvent Debtors under the proceedings in that Court, which may still be carried through, and that his now being in custody is entirely of his own seeking, I ought not to interfere.

As only one creditor has proved, the choice of assignees must be adjourned for a fortnight, to enable the creditors to inquire further into the circumstances. I do not conceive that any party can be damnified by this delay.

Application refused.

Solicitors, *Venning, Naylor, & Robins*; *Lawrance, Plews, & Boyer*; and *J. & J. H. Linklater*.

## EXPARTE THE ASSIGNEES OF BELL, IN RE BELL. (a)

COURT OF  
 BANKRUPTCY.

Before MR. COMMISSIONER FANE.

Dec. 21.

A person summoned as a witness, and as suspected of having property of the bankrupt in his possession, is entitled to his expenses in the first instance, where it appears he is only the servant or agent of the party suspected.

IN this case a person named George Bracher was summoned as a witness, and not appearing, a second and peremptory summons was issued, addressed to "George Bracher, one of the Directors of the Wilts and Dorset Banking Company, who have,

(a) Reported by A. A. Doria, Esq.

or are suspected to have, some estate of the bankrupt, or some part of the bankrupt's estate, in their possession. This being a second and peremptory summons, a warrant will be issued against you if you do not attend at the time and place specified." A similar summons was sent, addressed to "Samuel Provis, Manager of the Wilts and Dorset Bank, &c." Neither party appeared upon the summons, but an affidavit was put in by Mr. *Turner* (Solicitor) on their behalf, that their expenses were not tendered to them, although demanded. A second affidavit was made by Bracher, stating that he is not a director, or a shareholder of the bank.

Mr. *Wise*, for the assignees, contended that being summoned as to the estate of the bankrupt, it was not necessary to tender the expenses. [Mr. *Commissioner Fane*. Provis is summoned as the servant to the bank.] If this be the decision of the Court, all joint-stock companies must have their expenses tendered, notwithstanding they have the bankrupt's estate. By the Act of Parliament, Provis was the party to be sued as the public officer of the bank.

As to Bracher, his affidavit only speaks to the present time. These transactions took place in 1850, and the affidavit does not state that he was not a director then.

HIS HONOUR said,—Provis is the manager merely, and has no personal interest; he is simply the agent, and his expenses must be tendered.

As regards Bracher, his case is different; he is summoned as a director, and he swears he is not one. I must take the affidavit accordingly; and therefore his expenses must be tendered.

Solicitors, *Maples & Pearse*; *Sole & Turner*.

### EXPARTE PRICE, IN RE WILLIAMS AND MARCHANT. (a)

Before MR. COMMISSIONER GOULBURN, assisted by  
MR. COMMISSIONER HOLROYD.

THIS claim was argued before Mr. Commissioner *Goulburn* on the 17th September, on which occasion Mr. *Plews* (Solicitor) raised two objections to the proof.

(a) Reported by A. A. Doria, Esq.

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EXPARTE THE  
ASSIGNEES OF  
BELL, IN RE  
BELL.  
Statement.

COURT OF  
BANKRUPTCY.  
Dec. 19. & 23.  
W., the con-  
tinuing part-  
ner, on the  
faith of a state-  
ment made by  
P., the retiring  
partner, and

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PRICE, IN RE  
WILLIAMS AND  
MARCHANT.

really believed by P. at the time, viz., that A. owed 2500*l.* to the firm, covenanted to pay to P. 2000*l.* for the purchase of his interest in the partnership property. It afterwards appeared that, instead of A. being the debtor, the firm was indebted to him in about 700*l.*, and also in a sum of 1319*l.* to P.

*Held*, on the bankruptcy of W., not such a misrepresentation as should induce the Court to reject the proof of P. for the whole amount.

*Held*, also, that a solvent partner may prove against the separate estate of his co-partner, a bankrupt, in the event of a surplus.

*Statement.*

Mr. Commissioner *Goulburn* having subsequently expressed a wish to have the case re-argued, it was adjourned to this day, that his Honour might have the assistance of one or two of his brother Commissioners.

The application was to have a claim for 2000*l.* and interest, amounting to 2223*l.* 7*s.* 11*d.* turned into a proof as against the separate estate of Williams. The claim was founded upon the deed of dissolution of a partnership, which existed between Price, as the retiring partner, and Williams, in respect of certain cotton warehouses.

This partnership commenced in 1845 under the style of David Price and Company, and continued up to 1849, when it was proposed that Price should retire, and assign all his interest to Williams for 1000*l.* to be paid by instalments. This not being acceded to by Price, on the supposition that a sum of 2500*l.* was due from the firm of Price, Aykroyd, and Company to the firm of David Price and Company, it was eventually agreed that Price should be paid 2000*l.* in full for his interest in the warehouses, and that the partnership, as to him, should be dissolved; and the following letter was written by Williams to Price:—

“Easton, June 1. 1849.

“Dear Price,—Since I left you, I had some conversation with Mr. Part, and he said he should like you to write to him to Southport to-morrow. If you would rather get clear of the whole affair, I will offer you the amount you require; but can never think of any security, as it is quite out of the question for me to ask any one under present circumstances;—that is, 2000*l.* by instalments of 250*l.*—the first to be paid on the 1st of June, 1850, and the balance every three months bearing interest 5*l.* per cent., you signing a deed when the whole is paid. I am going to Holyhead to-night, and intend being back on Monday.

“Yours, &c.,

“W. WILLIAMS.”

A deed of dissolution was accordingly prepared in the office of Messrs. Woodcock, Part, and Scott, solicitors, at Wigan, in Lancashire, who were also mortgagees in possession of the warehouses for the sum of 29,000*l.* The deed was executed by both parties on the 24th July, 1849, the execution of Williams being attested by Mr. Scott, a partner in the firm of Messrs. Woodcock and Company; and that of Price by one Daniel, who was a clerk to Mr. Wood, solicitor, at Liverpool. By the terms of this deed, which was between Price of the first part, Williams of the second part, and Mr. Hughes of the third part,



the partnership was declared dissolved as from the 24th July, 1849; and notice of such dissolution was to be inserted in the *Gazette*. Price then assigned to Williams all his share and interest in the partnership, debts, credits, moneys, and securities, and covenanted to convey his interest in the warehouses so soon as the 2000*l.* covenanted to be paid by Williams, with interest, were paid; and in the mean time this sum was to remain as a charge upon the warehouses, as if he, Price, had been an unpaid vendor. Williams covenanted to pay Price 2000*l.* with interest at 5*l.* per cent., by quarterly instalments of 250*l.* each, the first instalment to become payable on the 1st June, 1850; and also to pay the mortgages and the other copartnership debts, and to indemnify Price. The deed further contained a covenant by Williams and Hughes, as surety to pay 1000*l.*, part of the said sum of 2000*l.*

In April, 1849, the partnership between Williams and Marchant commenced, and was continued up to the bankruptcy in November, 1851. The petition for adjudication was filed on the 28th at the instance of the bankrupts, by one Steen, a clerk, in their employ, and afterwards in that of Williams. Evans, who supported the trading, was the book-keeper of the bankrupts. The act of bankruptcy was an assignment to a person in their employ. On the 19th December, 1851, Mr. Hughes, the brother-in-law of Williams, with Mr. Welton and Mr. Cousins, were chosen assignees.

On the 29th March, 1852, a joint balance sheet was filed; but no separate balance sheet having been filed by the bankrupts, the last examination was adjourned to the 14th May. Several other adjournments took place, and eventually it was adjourned *sine die*.

Mr. Hughes, the assignee, proved against the separate estate of Williams for 939*l.* 13*s.* 3*d.*

In March, of the present year, a sum of about 19,000*l.* was paid into the hands of the official assignee to the credit of the joint estate of Williams and Marchant, and in the following month a dividend of 20*s.* in the pound was declared.

In July last a dividend of 10*s.* in the pound was paid to the separate creditors of Williams. Only three parties had proved against the separate estate of Williams, viz. Hughes and two others, named Griffiths and Cook, all of whom received their dividends.

On the first instalment becoming due under the deed of dissolution in June 1850, Price applied for payment to Williams, who refused, on the ground that he had been misled by the re-

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PRICE, IN RE  
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Statement.

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Statement.

presentations of Price in regard to the supposed debt of 2500*l.*, from the firm of Price, Aykroyd, and Company.

On the 9th July, 1853, a proof was tendered on behalf of Price, which, after some discussion, was admitted as a claim, subject to its being turned into a proof on abandonment by Price of his lien upon the property comprised in the deed of dissolution. (a)

It appeared, in evidence, that instead of the firm of Price, Aykroyd, and Company being indebted to the firm of David Price and Company in the sum of 2500*l.* the latter firm owed the former about 700*l.* Price admitted this was so; but said that at the time he made the above statement, he believed it to be true; and that he was not aware, at the time he asked 2000*l.* for the purchase of his interest in the warehouses, that the firm of D. Price and Company was actually owing him a sum of 1319*l.* which became merged in the 2000*l.*

Williams, on the contrary, stated that he had executed the deed entirely on the faith of the representations made by Price; that, on the discovery of the mistake, he was dissatisfied; whereupon Price proposed to burn the deed, and make partition of the property. Williams objected on account of the expense already incurred, and Price immediately offered to pay all the costs out of his own pocket.

Argument.

Mr. *Bagley*, on behalf of Price, contended that the assignees, *quâ* assignees, had no interest whatever in this application, but that Williams was the only party interested. Under this bankruptcy all the joint creditors had been fully paid, with interest; so that the question now before the Court must be regarded as if there never had been any joint creditors at all. Mr. Price claimed against the separate estate of Williams under the deed of dissolution of the 24th July, 1849; and on tendering his claim he was compelled to give up his securities. Two objections were made to this proof: 1st. That it was the claim of a partner to prove against the estate of his co-partner, several co-partnership debts being still unpaid; and 2ndly. That the deed, upon which this claim was founded, was obtained by misrepresentation on the part of Price, and was, therefore, void.

As to the first objection, it was said that Messrs. Woodcock and Company are creditors to a large amount, as also Mr. Hughes, the trade assignee. In regard to Woodcock and Company they are amply secured: they are mortgagees in possession of the warehouses, and in receipt of the rents and profits. The

(a) *Suprà*, p. 74.

interest upon the mortgages was about 2335*l.* whilst the rent of the warehouses amounted to about 4080*l.*, so that a surplus remains to be accounted for. Messrs. Woodcock and Company have not proved, and do not appear at all before the Court. As to Hughes, the assignee, he has proved for 939*l.* as against the separate estate in respect of a debt due to him, as he has stated, from Williams, and not from Price and Company. There is no suggestion that he is a creditor at all as against this estate. The two cases cited by Mr. *Honeyman* on a former occasion, of *Exparte Carter (a)*, and *Exparte Ellis (b)*, referred to the case of a subsisting, or *quasi* subsisting partnership, and not to a partnership completely dissolved. The real question is whether Price is to be considered a partner. We say he was not in any way a partner at the time of this bankruptcy. In *Exparte Ellis* the name of the retiring partner was used with his consent, and the business was carried on in the old name up to the time of the bankruptcy, in pursuance of an agreement entered into at the dissolution; he was, therefore, in actual partnership, or something equivalent to it. In this case, on the contrary, the partnership was actually dissolved, with notice to all the world, in 1849; and all the partnership assets passed to the separate property of Williams by the deed of dissolution. *Exparte Reeve. (c)* But assume Price to be a partner, there can be no competition with the partnership creditors so as to preclude him from his proof. The rule in bankruptcy, for rejecting a proof when tendered by a partner, is founded on the principle that he shall not thereby be enabled to compete with creditors, who are his own creditors conjointly with others. But here there are no joint creditors. A final dividend has been made, and no proofs have been admitted against Williams and Price. It is merely assumed that there are partnership debts; but it must be shown beyond all doubt that there are joint creditors, whose debts are still unpaid. The suggested debt of Hughes could not be sustained if he should come here to prove. He has received his debt due from the joint estate under this bankruptcy, and a dividend upon his debt owing from the separate estate of Williams. If anything be due to him from this estate he should come in and prove, or take the consequences of his neglect: as assignee he has full knowledge of all the circumstances. In *Exparte Carter* and *Exparte Ellis* there were joint debts; but here there are no joint debts. Hughes has not proved against this estate. Now, regarding Williams as the only bankrupt, the joint creditors of

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 MARCHANT.  
*Argument.*

(a) 2 Gl. &amp; J. 233.

(b) Ibid. 312.

(c) 9 Vcs. 589.

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MARCHANT.

Argument.

Williams and Price could not prove against the separate estate. *Exparte Morris*. (a) On the other hand, Price proposes to prove, not against the joint, but against the separate estate; that is, an estate separate from that against which Hughes has any right to prove; so there can be no competition. The joint creditors cannot come against the separate property, even where the joint property has been converted by an act of bankruptcy. *Exparte Freeman* (b), *Exparte Williams* (c); and see *Exparte Grazebrook* (d), *Exparte Hall* (e), *Exparte Cook*. (f)

Hughes is privy, and a party to the deed of dissolution, and a surety for this very sum for which we seek to prove. He must therefore be regarded as an assenting party. Woodcock and Company settled the deed as the solicitors of Williams, and attested for him. They are, therefore, fully cognisant of its details; and being mortgagees in possession, have made their election.

This is a claim to prove against a surplus. More than sufficient has been realised by the assignees: consequently there can be no competition. A partner may prove against a surplus on the authority of *Exparte Reeve* (g), *Exparte Carter*, and *Exparte Cook*; *Attwood v. Small* (h), was also referred to.

As to the second objection, the misrepresentation by Price, I shall offer no observations. The Court will hear what is alleged on the other side.

Mr. Willes for the bankrupt Williams. This proof is founded on the validity of the deed of 1849, and the covenant by Williams to pay Price 2000*l*. Williams first proposed to give 1000*l*. only, but Price was unwilling to take so small a sum, and, to induce Williams to increase his offer, he represented that about 2500*l*. were due from Price, Aykroyd, and Company, to D. Price and Company, whereupon Williams agreed to pay 2000*l*.

The question is, Did Price make this statement with a view to fraud? It was a material element of consideration for Williams, as to whether this money was really due from Price, Aykroyd, and Company. Price admits that when he made the statement he had no certain means of arriving at that amount, and that the books were not made out. He was in receipt of the moneys, and entered the transactions of the concern in the books, which were in his possession: but notwithstanding this he came to that conclusion in so fallacious a manner, that, as it

(a) Mont. 218.

(b) Buck. 471.

(c) Ibid. 13.

(d) 2 D. & Ch. 186.

(e) 3 Dea. 125.

(f) Mont. 228.

(g) *Ubi supra*.

(h) 6 Ch. & Fin. 232.

has ultimately turned out, Price, Aykroyd, and Company were really creditors. It took from July, 1849, to January, 1850, to make up the accounts. Till this was done Williams was in total ignorance of the blunder made by Price; he remonstrated, and Price proposed to burn the deeds; he therefore was aware that he was in the wrong. Williams objected to cancel the deed, but he was far from agreeing that it should remain binding as against him: nothing further was done. Several instalments became due; the first in June, 1850, and Price applied to Williams, who refused to pay, and there the matter rested: therefore, upon discovering the error committed by Price, both parties abstained from acting upon the deed. I submit that either the deed is bad at Law on the ground of fraud, or misrepresentation sufficient to invalidate it, or that it is not such a deed as a Court of Equity would enforce against Williams. Williams' letter to Price contained no arrangement in regard to the security. Price appears to found his case upon his neglect to keep the books. But can he have been mistaken as to the real value of the property? The first question that arises in this state of affairs is, whether this deed can be enforced at Law, as being "*crassa negligentia, quæ dolo æquiparatur*," either for fraud, or misrepresentation equivalent thereto, and such as Williams was induced to regard as true: *Adamson v. Jarvis*. (a) As to the effect of fraud on similar instruments, see *Fermor's Case* (b), which is the first and leading case upon this subject, and *Raphael v. Goodman* (c), which is the last.

A wilful misstatement is not necessary to constitute fraud; a miscalculation, showing a fallacious result arising from sheer negligence, is sufficient, and figures are simply useless, unless capable of reasonable proof: *Ex parte Mudie*. (d) The objection is founded on mistake. In Equity, where mistake is committed to so large an extent as in this case, the Court will set the whole aside, and take the account *de novo*: *Pritt v. Clay* (e); and will also set aside the deed, upon which the mistake is founded. *Story on Equity Jurisprudence* (f), *Beaumont v. Dukes* (g), *Myers v. Watson* (h), *Flight v. Booth* (i), *Robinson v. Musgrove*. (k) A statement, which has no foundation in truth, made in order to induce a purchaser to increase his offer, if not a ground of defence at Law, is so in Equity. Then as to the circumstances under which this deed was entered into; the onus of proof rests

1853.

EXPARTE  
PRICE, IN RE  
WILLIAMS AND  
MARCHANT.

Argument.

(a) 4 Bing. 66.

(b) 3 Coke, 77. a.

(c) 8 A. &amp; E. 565.

(d) 3 M. D. &amp; D. 66.

(e) 6 Beav. 503.

(f) Vol. i. s. 193.

(g) Jac. 422.

(h) 1 Sim. N. S. 523.

(i) 1 Bing. N. C. 370.

(k) 2 Moo. &amp; R. 92.

1853.

EXPARTE  
PRICE, IN RE  
WILLIAMS AND  
MARCHANT.

Argument.

upon Price, and he has done nothing: it must not be assumed that Williams did anything after discovering the mistake.

Lapse of time is also against this proof being admitted, as showing the mode in which Price regarded this deed. He has never acted upon it: he has not sued Williams upon the covenant.

I submit, therefore, that this Court should give Williams that relief to which he is clearly entitled in Equity.

Mr. Sumner, for the assignees. One partner cannot be admitted to prove against the estate of his co-partner, unless he first pays the partnership debts. This rule is laid down in *Story on Partnership* (a) as well decided; but it is said not to be applicable to this case. Although the partnership is dissolved as between the partners themselves, it doubtless subsists as to third parties, until all the debts are paid; here the debts were incurred before the dissolution, and it does not appear that any have been contracted since. Unless Price be a partner as to third parties, the rule will not apply; but it is never qualified, as appears by the case of *Exparte Ellis* (b): so also *Exparte Sillitoe* (c), *Exparte Reeve* (d), and *Exparte Ogle*. (e) In *Carter's Case* it was said that debts were proved to a large amount, as may be the case here: there are other creditors besides Woodcock and Company, and Hughes.

The covenant by Williams to indemnify Price shows that Price was still considered liable: *Exparte Hall* cited in *Story on Partnership* (f), and *Exparte Grazebrook*. (g) This case was distinguished on specific grounds. In *Exparte Hall* (h) the three Commissioners gave their decisions, and each supported his view by a distinct reasoning; this, therefore, is sufficient to take that case out of the general rule. Then the question arises, whether the creditors have sufficiently acquiesced, to shift the liability. *Kirwan v. Kirwan* (i), *Hart v. Alexander* (h), *Heath v. Perceval* (l), *Exparte Law* (m), and *Exparte Carpenter*. (n)

Mr. Bagley was not called upon to reply.

Dec. 23.  
Judgment.

MR. COMMISSIONER GOULBURN, in delivering judgment, commented at some length upon the evidence, and proceeded: The question is, when the alleged misrepresentation was made; and in considering this the exact time when the 2000*l.* were

- (a) Sect. 406.
- (b) *Ubi supra*.
- (c) 1 Gl. & J. 374.
- (d) *Ubi supra*.
- (e) Mont. 350.
- (f) Sect. 406.
- (g) *Ubi supra*.

- (h) *Ubi supra*.
- (i) 2 C. & M. 617.
- (k) 2 M. & W. 484.
- (l) 1 P. W. 683.
- (m) 1 M. & Ch. 690.
- (n) 1 M. & M.A. 1.

secured becomes important. The dissolution took place on the 24th July, 1849. As regards the 2500*l.* averred as an inducement upon Williams' mind to execute the deed, I think it impossible to say there was any fraud as to that. Price offered to burn the deed, which Williams declined on account of the expense; Price answered, I will pay all the expenses. This shows on his part a fairness of dealing, and nothing at all resembling fraud. Both parties were duly represented at the time of executing the deed, so that it cannot be said there was any ground of fraud, actual or constructive. Then as to the other part, it is unnecessary to go through all the authorities; it is contended that, although there is no fraud, yet if falsehood or mistake exist, the covenant should not be enforced. *Story's Equity Jurisprudence* (a) was referred to by Mr. Willes, where there is misrepresentation, or *suggestio falsi*. Williams must have had access to the books and accounts. By Mr. Justice *Story's* reasoning, it would seem necessary that a partner should be influenced by the misrepresentation, in order to avoid the contract. He refers to a case of *Vernon v. Keys* (b), and the judgment of Lord *Ellenborough* there, as to what the purchaser has not the means of knowing in regard to the rule of *caveat emptor*. It is said, the contract did not contain the misrepresentation; but if it did, this case does not warrant me in saying that it operated on Williams' mind; he entered into it with full power of informing himself, and he did not take the trouble. Sir *Edward Sugden*, in his book on *Vendors and Purchasers* (c), lays down the rule *simplex commendatio non obligat*, as borrowed from the Civil Law. In another passage (d) he says, "if the contract be founded on fraudulent misrepresentations, such as would, in a Court of Law, be sufficient to support an action on the case, it may, in a Court of Equity, be rescinded. The fraud may consist in the misrepresentation of a fact material to the contract, where the truth of that is known to the one party, and unknown to the other, and the misrepresentation is intentionally made with a view of procuring a more advantageous contract than the real facts, if truly stated, would have warranted; and in such a case Equity would rescind the contract." That, however, is not the case here, and I do not think the position sufficiently established to enable Williams to get rid of the obligation entered into. *Pritt v. Clay* (e) was relied on; in that case the contract was founded upon the misrepresentation; here the misrepresentation formed no part of the contract.

1853.

EXPARTE  
PRICE, IN RE  
WILLIAMS AND  
MARCHANT.

Judgment.

(a) 4th edit. p. 216. s. 193.

(b) 12 East, 637.

(c) Last edit. 1846, p. 2.

(d) Page 239.

(e) *Ubi supra*.

1853.

COURT OF  
BANKRUPTCY.

Dec. 27.

Jan. 7, 1854.

A., some years ago, purchased an estate at an auction, upon conditions, and paid a deposit, but being dissatisfied with the title, he abandoned the contract. The auctioneer retained the deposit. — *Held*, on the bankruptcy of the vendor, that A.'s right to recover was against the auctioneer, and not against the assignees. *Semble*, the auctioneer was not justified in setting off the deposit received from A. as against a debt due to him from the bankrupt.

## EXPARTE BRADSHAW, IN RE GRAVES. (a)

Before MR. COMMISSIONER EVANS.

THIS case, which was argued some days ago, now came on for judgment. The facts are stated in the judgment, which was as follows: —

HIS HONOUR said, — This case was submitted for my decision by the consent of all parties. It appears that Mr. Bradshaw had purchased certain property at a sale by auction on certain conditions, and had paid to Mr. Hoard, the auctioneer, the sum of 48*l.* by way of deposit. The auction took place in 1842. Eventually Mr. Bradshaw was dissatisfied with the title, and abandoned the contract. He now seeks to recover the deposit from the assignees, alleging that they have been enabled to get more for the property. The cases relied on were *Burrough v. Skinner* (b), *Edwards v. Hodding* (c), *Farquhar v. Farley* (d), *Lee v. Munn* (e), and *Bamford v. Shuttleworth*. (f) In my judgment, Mr. Bradshaw's right to recover the deposit exists against the auctioneer, and not against the assignees, as neither the bankrupt nor the assignees have ever received the money. I am aware that Mr. Hoard claims a right to set it off against a debt due to him from the bankrupt, but I am of opinion he had no right to do so.

Solicitors, *Alexander ; Birkett*.

(a) Reported by A. A. Doria, Esq.

(b) 5 Burr. 263.

(e) 8 Ibid. 45.

(c) 5 Taunt. 819.

(f) 11 A. &amp; E. 926.

(d) 7 Ibid. 592.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 9.

Where an insolvent proposes to set aside a portion of his income for the benefit of creditors, the Court, in considering the sufficiency of the proposal, will have regard to the circumstances in which he is placed, his condition in life, and the duties imposed upon him.

## RE W. G. MAXEY. (g)

Before MR. COMMISSIONER MURPHY.

THE insolvent, a clerk in the Post Office, had petitioned under the protection statutes; and had filed a proposal to set aside 60*l.* annually for the benefit of creditors. It appeared that he was in receipt of a yearly salary amounting to 150*l.*, and it was suggested on behalf of the creditors that the proposal was insufficient.

MR. COMMISSIONER MURPHY said he thought the proposal a liberal one. The rule he should adopt in considering proposals of this kind was this: he should have regard to the

(g) Reported by E. H. Reed, Esq.



circumstances in which the insolvent was placed, his condition in life, and the duties imposed upon him. He should hold the balance between both parties, and adopt the golden rule of doing justice on each side. While upholding the interest of creditors, he should be careful not to compel the insolvent to contract fresh debts, and thus force him to apply again to the Court, to the prejudice of all parties concerned. The offer made was a liberal one; and the insolvent would have protection from time to time, so long as he made the necessary payments.

Attorney, *Swan*.

1853.  
RE W. G.  
MAXEY.  
*Judgment.*

## RE RICHARD HUTCHINSON. (a)

Before MR. COMMISSIONER PHILLIPS.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.  
Nov. 21.

THE insolvent had filed a petition for protection on the 22nd September. In the month of July preceding, he had assigned

Where it appears to the Court that the allegations of the petition are untrue, it will be dismissed. (b)

(a) Reported by E. H. Reed, Esq.

(b) This course is not imperative. The Commissioner has a discretion, and may either dismiss the petition or name no day. In *Re J. Whitfield Collier*, 1 Cox & Mac. 74., the late Chief Commissioner says, "It is contended for the insolvent, that if the petition be in the proper form, no matter whether the statement it contains be true or false, still such petition may be sustained. Now, it does seem a very startling proposition, that justice shall be satisfied by a mere form. The Legislature seems to say that this matter must be performed in a certain way. The form is the same in the first Act. The words are, that he shall swear 'that the several allegations in the said petition, and the several matters contained in the schedule hereunto annexed, are true.' This is the identical form in the first Act. Now, it seems to me that these two courses are open to the Court, — to deal with it in two ways, — to dismiss the petition, which is our undoubted right, or to apply the 4th section of the 5 & 6 Vict. c. 116. The Act which says that such petition shall be dismissed, does not confine the Court to say you shall not dismiss in any other case, but rather it went the other way; for if it provided that in this particular instance you shall have no discretion, but shall dismiss, then in the other case a

discretion might be exercised. There was no doubt but that the Court had power to dismiss the petition, although it was quite in the form prescribed; otherwise it would lead to these consequences, that it was perfectly immaterial whether the oath was true or false: a proposition which could not come into the minds of any Legislature. It was expressly said in the 74th section of the 7 & 8 Vict. c. 96., that nothing in that Act shall be construed to repeal, affect, or in any manner alter the provisions of the former Act, the 5 & 6 Vict. c. 116., except as expressly provided, or except as the provisions of that Act were inconsistent or at variance with the provisions of the former Act, save where the first Act of Parliament was expressly alleged to be altered, or where it was an obvious inference its provisions remained in force. The second Act, so to speak, continued to keep an eye on the 4th section of the former Act, which begins by enacting, that if it shall appear to the Commissioner that all matters in the petition and schedule are true, then it shall be in the power of the Court to name a day for the final order. Is it not common sense, that if these conditions, upon which a day is to be appointed for the final order, be not observed, the Court has no power to name a day? They had a

1853.

RE RICHARD  
HUTCHINSON.  
*Argument.*

the whole of his stock-in-trade to a trustee for the benefit of creditors.

Mr. *Cooke* called the attention of the Court to the allegations in the petition, "That your petitioner has not parted with, or charged any of his property (except for the necessary support of himself and family, and the necessary expenses of his petition, or in the ordinary course of trade), at any time within three months of the date of filing his petition." The assignment did not come within either of the exceptions, and the sworn allegation was untrue. It was, therefore, submitted, that the petition must be dismissed.

Mr. *Nichols*, *contra*.

*Judgment.*

MR. COMMISSIONER PHILLIPS. The allegation is untrue, and the petition is dismissed.

Attorneys, *Archer* ; *Adams*.

right, then, either to dismiss the petition or refuse to make a final order." Some allegations in the petition are of the first consequence, because they determine the jurisdiction of the Court, such as "that your petitioner is a trader, but owing

less than 300*l*;" but, on the other hand, other allegations are of comparative unimportance. The present Chief Commissioner very seldom dismisses a petition on a matter of form, which does not interfere with the jurisdiction of the Court.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 25.

A., who had obtained a judgment against the insolvent for 40*l*., assigned it to B., empowering him in the name of A. to issue execution, proceed to outlawry, or otherwise, as should be necessary for the recovery of the debt. Subsequently A. was declared a bankrupt. *Held*, that B. was entitled, in the name of A., to oppose the insolvent.

RE HARRY ROBERT SORRELL. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, who described himself as out of business, appeared on his interim order for protection.

Mr. *Cooke* opposed on behalf of Mr. Stopher, a solicitor.

Mr. *Reed* objected to Mr. Stopher's being heard. The facts of the case were these: The insolvent had carried on the business of a hosier, which, in September, 1852, in consideration of the sum of 587*l*. 5*s*., he assigned to one John Scott, the money being secured by a number of bills. Previously to the first bill, which was for 100*l*., becoming due, Scott had communicated to the insolvent his inability to meet it, alleging an absence of funds at his bankers. An arrangement was in consequence entered into between them, by which the insolvent consented to hold the bill until the receipts in the business, the whole of which were to be appropriated to that purpose, should discharge it. During the first week the business produced 80*l*., but the insolvent only received from Scott 40*l*. Wishing,

(a) Reported by E. H. Reed, Esq.

therefore, to secure himself in case it should be necessary to bring an action on the bill, he presented it to the bank, when, to his surprise, it was immediately paid. Two days afterwards an action was brought against him at the suit of Scott to recover the 40*l.* and damages for presenting the bill. During the progress of the action the insolvent paid into the bank, to Scott's account, the 40*l.* he had received from him; but the action proceeded to trial notwithstanding, and as the pleading raised only the issue of receiving the 40*l.*, a verdict was directed for that amount. About October, 1853, Scott was declared a bankrupt, but previously thereto he had assigned to his attorney, Mr. Stopher, his judgment against the insolvent as security for some costs incurred in the action; the assignment empowering the assignee, in the name of the assignor, "to issue execution, proceed to outlawry, or otherwise, as should be necessary," for the recovery of the debt. The schedule showed a debt of 450*l.* owing from Scott to the insolvent; it was clear, therefore, that he had no *locus standi* to oppose, since an adjustment of accounts would leave him a debtor to the insolvent. Besides, if he ever had any title to complain, his bankruptcy had superseded it, and vested it in his assignees, who did not appear. The right to oppose in Mr. Stopher could not be greater than that which was vested in Scott: he was a debtor and had no right; how, then, could Mr. Stopher have any? The assignment, moreover, limited the power of the assignee; its object was to get the debt, and it gave the assignee no power to oppose in case of the defendant's insolvency. It was therefore submitted that Mr. Stopher was not entitled to be heard.

*Mr. Cooke.* The assignment of a debt vested in the assignee all the incidents connected with it, one being a right to oppose in the event of an insolvency. The bankruptcy of Scott did not interfere with the rights of Mr. Stopher; it left him in full possession of all the powers contained in the assignment. Whatever was owing from Scott to the insolvent was a debt on simple contract; but that assigned was a judgment debt, and the one could not be merged in the other. Mr. Stopher may have no individual case to offer, but he was entitled to make an inquiry into property. The principle adopted by the Court was, that where a man was acknowledged as a creditor, he had a right to oppose.

*MR. COMMISSIONER MURPHY* said there was nothing restrictive in the assignment; and, looking at the words of it, he should take it to be an assignment for all purposes. He should therefore give it the same effect as an assignment at law, where

1853.  
 RE HARRY  
 ROBERT  
 SORRELL.  
*Argument.*

*Judgment.*

1853.

RE HARRY  
ROBERT  
SORRELL.  
*Judgment.*

the assignee of the debt would have to proceed in the name of the assignor. The name of Scott might be nominally employed to sustain his interests. In Equity the effect of such an assignment would be to give him the power to proceed in his own name.

*Attorneys, Stopher ; Hutchinson.*

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

*Dec. 10.*

The acceptance of a smaller sum in satisfaction of a greater sum, constitutes no legal discharge of a debt ; therefore, in estimating the amount of an insolvent's liabilities, the difference will be taken into consideration.

*Argument.*

THE insolvent, a petitioner for protection, had appeared on a former day on his final order, when an inquiry was opened respecting the disposition of his stock-in-trade as a bookseller and publisher, which was not mentioned in the schedule. It was alleged that the same had been seized, under a bill of sale, by one Dr. Hayes, and the case was adjourned for the attendance of that gentleman.

Dr. Hayes now appeared, and produced the bill of sale, which recited a judgment debt for 103*l.* 10*s.* ; the goods on being sold had only realised 25*l.* ; but shortly after the sale Dr. Hayes had verbally discharged the insolvent from the remainder of the debt.

It was objected by Mr. *Reed* that the petition must be dismissed. The judgment debt had not been satisfied ; therefore the difference, 78*l.* 10*s.*, was still due, and Dr. Hayes was a creditor to that amount. The schedule showed debts amounting to 252*l.* ; and, adding to that sum the balance due to Dr. Hayes, the aggregate would deprive the Court of jurisdiction. The acceptance of a smaller sum in satisfaction of a greater constituted no legal discharge. A debt of 20*l.* could only be discharged by an equivalent payment ; and, although Dr. Hayes would never sue for the difference, still his forbearance did not relieve the insolvent from his legal responsibility.

Mr. *Sargood* supported.

*Judgment.*

MR. COMMISSIONER PHILLIPS said the generosity of Dr. Hayes did not extinguish the debt. A legal responsibility still attached to the insolvent ; and, as there had been no release executed, the debts carried the case beyond the jurisdiction of the Court, and the petition must be dismissed.

*Attorneys, Wright ; Moss.*

(a) Reported by E. H. Reed, Esq.

## RE RICHARD THORNE. (a)

Before MR. COMMISSIONER MURPHY.

1853.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Dec. 14.

THE insolvent, a petitioner for protection, appeared on his interim order.

In April, 1852, he became the tenant of premises in Earl Street, under an agreement for a lease. Shortly after taking possession, he expended 140*l.* in repairs and alterations. On 22nd October, 1853, in consideration of a sum of 100*l.*, he disposed of the agreement, fixtures, and goodwill; but he paid nothing to the creditors under his insolvency. On the 26th of the same month he filed his petition for protection.

An insolvent who disposes of property within three months of the filing of his petition, has no *locus standi* under the protection statutes.

Mr. *Dowse* called the attention of the Court to the allegations in the petition: "That your petitioner has not parted with or charged any of his property (except for the necessary support of himself and his family, and the necessary expenses of this, his petition, or in the ordinary course of trade), at any time within three months of the date of filing his petition, or at any time with a view to this petition." It was clear that the insolvent, on the 20th October, was possessed of a valuable property in the agreement, fixtures, and goodwill of the premises in Earl Street; he had disposed of everything; and although he had received 100*l.*, he had not applied a shilling of it to the payment of the creditors in the schedule. The allegation of the petition was untrue, and it was submitted that it must be dismissed.

*Argument.*

Mr. *Cooke* said that no doubt there were cases to be found where petitions had been dismissed, the allegations being untrue; but the practice adopted by the Chief Commissioner was to inquire into the whole facts of the case, and if no dishonesty appeared, a day was named for the final order. The objection taken was a mere technicality. The proper course to pursue was to take into consideration how and for what purpose the property had been disposed of, and if the transaction was not marked with unfairness, to support the petition.

MR. COMMISSIONER MURPHY. It appears to me that the property was disposed of with a view to petitioning the Court, and if the case was gone into, I should hold that a fraud; and therefore I dismiss the petition.

*Judgment.*

Attorneys, *Pike*; *Bussel*.

(a) Reported by E. H. Reed, Esq.

1853.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Dec. 16.

A vexatious  
defence to an  
action is not a  
ground of op-  
position to an  
insolvent under  
the protection  
statutes.

Argument.

## RE WILLIAM LIDDELOW. (a)

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, a petitioner for protection, appeared on his final order, and was opposed on the ground of a vexatious defence to an action. It appeared that he had accepted a bill of exchange for 10*l.*, which being dishonoured at maturity, an action was commenced against him in December, 1852, to which he had pleaded in person that *he did not accept*. No defence was made at the trial, and the costs were increased by the plea about 14*l.* Subsequently, in May, 1853, a second action was brought on the judgment, to which the insolvent again appeared in person, and pleaded *nul tiel record*, which caused a further increase of 9*l.* 14*s.* costs.

Mr. *Reed* complained that the insolvent had unfairly and fraudulently contracted the debt for costs, and without a reasonable expectation of payment. [Mr. Commissioner *Phillips*. Can I deal with this under these statutes?] It was submitted that the Court had an ample jurisdiction to deal with any offence. Section 4., 5 & 6 Vict. cap. 116., and section 24., 7 & 8 Vict. cap. 96., enumerated particular offences, which, if proved on the first examination, disabled the Court from proceeding to name a day for the final order. The acts were silent as to what should be a valid ground of objection to the granting of the final order; but the Court had nevertheless an ample authority to recognise and punish any offence which might be proved against an insolvent on that day. If this was not the intention of the Legislature, it could be no advantage to any one to bring an insolvent a second time before the Court. Section 4., 5 & 6 Vict., provided that under particular circumstances it should "be lawful for the said commissioner to cause notice to be given, that on a certain day, to be named therein, he will proceed to make an order, *unless cause be shown to the contrary*; which order shall be called the final order." This enactment was in effect analagous to the discretionary clause, 1 & 2 Vict. cap. 110. s. 76. Unless those words empowered the Court to act, they were meaningless. Section 27., 7 & 8 Vict. invested the Court with a discretion; at the time appointed for making the final order, to adjourn the consideration of such final order *sine die*. That clause also was silent respecting the reason which should induce the Court to exercise such a discretion; but the power was clear: it could not be to make or complete a service; it could not be to amend the schedule, or to advertise a description

(a) Reported by E. H. Reed, Esq.

omitted from the schedule; for in either event the case would be adjourned to a particular day. Was it not, then, the intention of the Legislature thus to arm the Court with an authority to punish any offence which on that day might be proved? Looking at that section in conjunction with the 28th and 24th, it was submitted that such an intention was manifest. Granting, then, that the power appeared, the next question that arose was, what should induce the Court to exercise it, or what, in the words of the Act, would be "a cause to the contrary?" The preamble to 5 & 6 Vict. c. 116. recited, "Whereas it is expedient to protect from all process against the person, such persons as have become indebted without any fraud, or gross or culpable negligence." It was submitted that any dishonest dealing or improper conduct came within the spirit and intention of the Act. The insolvent had admitted that he could not justify the pleas to either action — how, then, could the Court? Was not that defence a fraud? It was founded in untruth, and justified by no legal or honest principle. [He referred to the practice in the Court of the *Chief Commissioner* and *Mr. Commissioner Murphy*, which recognised offences such as that proved, both on the day for the first examination, and the day appointed for the final order; and suggested the desirability of an uniformity in the practice of the three Courts.]

*Mr. Dowse*, for the insolvent, urged that inasmuch as the Legislature had omitted from the specification of offences that of a vexatious defence to an action, it was but fair to conclude that the omission was purposely made; and that to give effect to the opposition would be to strain the provisions of the Act to purposes never contemplated by the framers of it. Besides, the first debt was merged in the second judgment; and with respect to the costs incurred by the defence to that action no complaint could be sustained, because those were costs incurred by bringing an action on a judgment; and 43 Geo. 3. c. 48. provided that plaintiffs in such actions should not recover costs, unless the Court should otherwise order. It was not anywhere shown that the Court did so order. The fact of producing the Master's allocatur proved nothing; because Masters would tax, as a matter of course, any bills presented to them for business transacted in their particular Courts. The principal question was, Had the Court the jurisdiction contended for? and it was submitted that it had not.

*MR. COMMISSIONER PHILLIPS* said, with respect to the rights to recover costs in an action on a judgment, the statute made it imperative that there should be a rule, but his judg-

1863.

RE WILLIAM  
LIDDELOW.  
*Argument.*

*Judgment.*

1853.  
 RE WILLIAM  
 LIDDELOW.  
*Judgment.*

ment would proceed on a different ground. A decision (a) of one of his Brother Commissioners (Mr. Commissioner *Murphy*) had been cited, from which it appeared that a vexatious defence to an action had been held to be a ground of opposition to the final order: he (Mr. Commissioner *Phillips*) believed the *Chief Commissioner* adopted the same doctrine. But the practice in this Court was different. He had always entertained a different view, and he did not recognise such a ground of opposition, either on the first examination, or on the day appointed for the final order. He wished it to be understood that he should persevere in this course until the point had been discussed, and determined the other way, by the majority of the Commissioners. The late Chief Commissioner *Reynolds* adopted his view upon this subject, that a vexatious defence to an action was not, *per se*, a ground of opposition under these statutes. His judgment in *Re R. H. Newman*, cited in *Macrae's Practice*, p. 417., was "That the old Act, 1 & 2 Vict. c. 110., was before the framers of this Act when it was drawn, and yet they had entirely omitted all mention of the vexatious defence to an action, as a ground for refusing protection. Is it not a fair inference from that omission that it was intended to exclude the vexatious defence to an action as a ground of complaint?" If the act was to be construed in the latitudinarian manner advocated to-day, the effect would be that every kind of impropriety which resulted in a debt due from an insolvent, the Court would be called on to punish, under cover of the vagueness of two or three expressions. The ground of his decision on the points before him was twofold: first, that the Act was silent as to a vexatious defence being a ground of opposition; and, secondly, that if the costs incurred were held to be a debt contracted without reasonable expectation of payment, the Court would stultify itself by such a decision, for the objection ought to be taken at the first hearing; and, if so, the day for granting the final order ought never to have arrived. Upon the preamble of the Act the time to take objections under those portions of the statutes was upon the first hearing. If this offence existed at all it took away the power of the Court to name a day on the first examination; and if parties pleased to lay by and suffer the Court to exercise the authority of naming a day for the final order, it did not invest them with the right of asking the Court, when that day arrived, to withhold protection for such an offence. The Court would, therefore, grant the insolvent his final order.

Attorneys, *Atkinson*; *Cooper*.

(a) Not reported.



## RE SAMUEL WRAY. (a)

Before MR. COMMISSIONER PHILLIPS.

1854.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Jan. 2.

Where an insolvent petitions the Court as a trader, but omits to describe himself as such in his petition, it will be dismissed.

Argument.

THE insolvent, who described himself as a "surveyor and house agent," had petitioned the Court as a trader, but the petition did not disclose the character in which he had traded so as to render him liable to the Bankrupt Laws. He had described himself in his schedule as an auctioneer, and it appeared on examination that he had purchased and sold at a profit large quantities of paper and of lead.

Mr. *Duncan* submitted that the petition must be dismissed. The insolvent had omitted from his description the trade of a paper dealer and a dealer in lead; he had not, therefore, complied with the terms of the Act of Parliament, which rendered it incumbent on him to insert, at full length, the description of the trade or business which he had carried on. Besides, although he had petitioned as a trader, the description in the petition did not disclose any trading whatever, which omission, in the case of *Re J. W. Russell*, cited in *Macrae's Practice*, p. 89., had been held, by the late Chief Commissioner, to be fatal; it being observed there, "that when a man petitions as a trader, his description ought to be that he was a trader; and that if he omitted so to describe himself, the petition was untrue, and for that reason would be dismissed. It was clear the insolvent could not amend the description in his petition, there being a number of decisions to that effect, collected by Mr. *Macrae*, and cited in his *Practice*, p. 71. Being unable, therefore, to amend and insert omissions which had clearly been made, it was submitted that the Court had no discretion in the matter, but must dismiss the petition.

Mr. *Sargood*, for the insolvent, urged that the sole object of the description was to identify the insolvent, and if the description was of such a character as to inform the world who the person was before the Court, the object of the Act was satisfied. It was not pretended that any one had been misled, or could be misled. The description, therefore, was sufficient.

MR. COMMISSIONER PHILLIPS said: I really think this man should have described himself in his petition, as of some trade. The case seems to me analogous to that of *Russell*, and I shall dismiss the petition.

Judgment.

Attorneys, *Rumsey*; *Dale*.

1854.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Jan. 11.

Where an insolvent is a certificated bankrupt, in estimating the amount of his debts under the protection statutes, those owing at the time of the bankruptcy will not be included.

*Argument.*

RE JOHN WHITFIELD. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, a petitioner for protection, appeared on his final order. The debts, in the schedule, amounted to 192*l*. He had obtained a certificate as a bankrupt in 1851, and the debts, then owing, were entered at 1000*l*.

Mr. *Macrea*, for a creditor, said, the jurisdiction of the Court depended on the amount of the insolvent's debts, and it became an important question, whether the certificate of a bankrupt so operated as to extinguish the debts then owing, or merely as a bar to any legal remedy. [Mr. Commissioner *Murphy*. The policy of these Acts being to protect the person of a debtor from arrest, is it not the same, where the remedy is barred, as if the debt was extinguished?] No; in the latter case it would be incapable of computation, but in the former, it would be kept alive for a variety of purposes. The case was analogous to a discharge under 1 & 2 Vict. c. 110., or to a protecting or final order, under 7 & 8 Vict. c. 96.: in either of those events, the debts would be taken into consideration upon a subsequent insolvency. *Re George Bohn* (b) and *Re David Brakenbridge* (c) were in point. Those cases were decided on the authority of *Jellis v. Montford* (d), where it was held, "that a creditor of an insolvent trader may, after the debtor's discharge, under 53 Geo. 3. c. 102., take out a commission of bankruptcy against him; and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt at law to support the commission." *Abbot C. J.* in delivering judgment said, "The proper course for us to pursue is, therefore, to inquire only whether the Insolvent Debtors' Act contains any provision which extinguishes the debt. Now, if the Legislature had intended to extinguish it, one word would have been sufficient; but no such word is found in the Act of Parliament." Was any such word to be found in 12 & 13 Vict. c. 106.?

Mr. *Cooke* (*amicus curiæ*). The debt is so far extinguished, that a subsequent promise or contract to pay it would carry with it no liability (e), and the Act provides that the bankrupt

(a) Reported by E. H. Reed, Esq.

(b) Cox & M. C. C. C., vol. i.  
part i. page 28.

(c) *Ibid*.

(d) 4 B. & A. 256.

(e) 12 & 13 Vict. c. 106. s. 204.

shall be discharged "from all claims and demands made provable under the bankruptcy." (a)

Mr. *Sargood* supported.

1854.  
RE JOHN  
WHITFIELD.

MR. COMMISSIONER MURPHY. I am quite satisfied. I shall hold that these debts do not come within the purview of this Act, and that they ought not to be included.

*Judgment.*

Attorneys, *Bristow & Tarrant.*

(a) 12 & 13 Vict. c. 106. s. 200.

## RE WILLIAM JEFFRIES. (b)

Before MR. COMMISSIONER MURPHY.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

1853.  
Dec. 6.

THE insolvent, a pickle merchant, had petitioned the Court for his discharge under 1 & 2 Vict. c. 110. In May, 1853, an action had been brought against him at the suit of his brother, John Jeffries, for trespass, and a verdict was returned with 4*l.* damages, which, together with 65*l.* costs, constituted the debt of the detaining creditor. In October the insolvent petitioned the Court, and Monday, December 6th, was appointed for the hearing of the case. At half-past seven in the evening of Saturday, December 4th, his discharge was lodged at the prison by his detaining creditor, and the insolvent set at liberty.

Where an insolvent has been discharged out of custody by his detaining creditor, the Court has no power to adjudicate.

*Statement.*

Mr. *Reed* called the attention of the Court to these facts. The question to be considered was, whether the Court could adjudicate, the insolvent being out of custody. The schedule showed that property to a considerable amount had been given up for the benefit of creditors; and to hold that the Court had no power to adjudicate, would be to expose the insolvent to the attacks of his creditors, and yet to withhold from him the only means of defending himself, namely, his property, for that would continue vested in the provisional assignee. The object of the Act was to discharge an insolvent from his difficulties, and yet to secure as much property as possible to creditors; but here, if the Court did not adjudicate, the creditors would get everything, and the insolvent nothing; he would receive no equivalent for the estate he had vested in the assignee. A gross fraud and cruelty had been practised towards him by the detaining creditor, with the sole view of defeating his application to this Court. A similar scheme had been adopted in

*Argument.*

(b) Reported by E. H. Reed, Esq.

1853.

RE WILLIAM  
JEFFRIES.  
*Argument.*

*Re Costa (a)*, but Mr. Commissioner *Phillips* discharged the insolvent notwithstanding. The only difference between this case and that, was, that there, the insolvent remained in prison, although his discharge was lodged at the gate; but still he was as much discharged by his detaining creditor as the petitioner in this case.

*Judgment.*

MR. COMMISSIONER MURPHY. I fear I have no power to adjudicate on the insolvent, he being out of custody. The Act of Parliament provides that no prisoner shall, upon his own petition, be entitled to the benefit of the Act, unless he shall be at the time of filing his petition, and during all the proceedings thereon, in actual custody within the walls of the prison, without any intermission of such imprisonment by leave of any Court or otherwise. (b) In the case referred to the insolvent had remained in custody, although his discharge was lodged at the prison. I have consulted the officer of the Court, being inclined to strain a point if I could fairly do so; because I consider the conduct of the detaining creditor to be exceedingly unjust and improper, and a trifling with the law; and I am informed that the Court has discharged insolvents in cases where they have remained in custody after their discharges have been lodged by their detaining creditors, and where they have come before the Court on the following day. But in this case there has been an actual break in the custody since Saturday, and, therefore, I do not consider that I have any power to interfere in the case; but I shall take a note of it, and if any amendment of the law of insolvency is contemplated, I shall recommend that this, amongst other things, shall be amended.

Attorney, *Hare*.

(a) Not reported.

(b) 1 & 2 Vict. c. 110. s. 38.

# ANONYMOUS. (c)

Before MR. COMMISSIONER EVANS.

COURT OF  
BANKRUPTCY.

1854.

Jan. 21.

The sufficiency of the affidavit of debt may be disputed at the time of showing cause against the ad-

A., the intended bankrupt, having been duly served with a summons issuing out of this Court, appeared to and made no objection to the same, but failed to pay or compound within the proper time, and thereby, as was alleged, had committed an

(c) Reported by J. W. M. Fonblanque, Esq.

act of bankruptcy (a), on which he was adjudicated a bankrupt, *ex parte*. The petitioning creditor, A., having given the proper notice (b), now appeared to show cause against the adjudication (c), on the ground that he had committed no act of bankruptcy.

The affidavit of debt stated, that "A. is justly and truly indebted to B. (the petitioning creditor), in the sum of 413*l.* 4*s.* 5*d.*, due on a covenant contained in a deed executed by A., dated, &c., to pay 445*l.* 4*s.* 5*d.*, less the sum of 32*l.*, claimed by way of set-off by A. against, but not admitted by, B. for money lent, &c."

Mr. *Lawrance* (Solicitor) for A., objected to the sufficiency of the affidavit.

Mr. *Leveson* (Solicitor) for B., contended that no objection to the affidavit having been taken at the return of the summons, A. was precluded from questioning its sufficiency on the present occasion.

Objection overruled by the Court.

Mr. *Lawrance*. The adjudication must be annulled for want of an act of bankruptcy. The general rules and orders made in pursuance of the Bankrupt Law Consolidation Act (d), require that affidavits to support the trade debtor's summons, must "state the nature of the debt with the same degree of certainty and precision as is now or shall hereafter be required in an affidavit, to hold to bail by order of a Judge in the Superior Courts at Westminster." (e) This affidavit is insufficient for that purpose, as it does not set forth all the parties to the deed, nor that A. was a party to the covenant: *Smith v. Kendal* (f), *Parkes v. Severn*. (g) The summons was therefore void, and no act of bankruptcy could be committed by virtue of it.

Mr. *Leveson*, *contra*. The affidavit refers to the deed by its date. A. does not deny its existence, and he must be aware of its contents.

MR. COMMISSIONER EVANS. The cases justify me in deciding that the affidavit would not be sufficient as an affidavit to hold to bail; it is, therefore, insufficient to support a compulsory act of bankruptcy. The adjudication must be annulled. (h)

1854.

ANONYMOUS.

Judication, although no objection to it was taken at the return of the summons.

Where the debt alleged to be due in the summons is founded on a covenant in a deed executed by the intended bankrupt, the affidavit of debt must state all the parties to the deed.

Argument.

Judgment.

(a) 12 & 13 Vict. c. 106. s. 78.  
*et seq.*

(b) General Orders, 19th October, 1852, No. 14.

(c) 12 & 13 Vict. c. 106. s. 104.

(d) 12 & 13 Vict. c. 106. s. 8.

(e) General Orders, No. 72.

(f) 7 Dru. & Ry. 232.

(g) 7 East, 194.

(h) See also *Holcombe v. Lambkin*, 2 M. & Sel. 475.; *Bosanquet v. Fillis*, M. & Sel. 330.; *Taylor v. Forbes*, 11 East, 315.; *Cathrow v. Hagger*, 8 East, 106.; *Fenton v. Ellis*, 6 Taunt. 192.

1854.

COURT OF  
BANKRUPTCY.  
Jan. 19.

## EXPARTE HARVEY, IN RE COLLINS. (a)

Before MR. COMMISSIONER GOULBURN.

C. assigned all his estate and effects to H., in consideration of H. having previously become surety for him for 100*l.*, and also of a present advance of 55*l.* The deed contained a proviso, permitting C. to retain possession of the property until default by him in paying the 100*l.* when due, and the 55*l.* when required. No default was made up to the time of the bankruptcy of C.; and the property was in the possession of C. at the time of the bankruptcy, and was sold by the assignees by consent of H., he submitting his right to the same to the judgment of the Court. — *Held*, that the assignment was an act of bankruptcy, and that the proceeds of the sale passed to the assignees of H.

*Statement.*

BY an indenture, dated 13th of August, 1853, between Collins (the bankrupt) of the one part, and James Harvey of the other part, after reciting that on 28th March, Collins and Harvey made a promissory note for 100*l.* to Messrs. Gurney and Company, but that Harvey signed the same only as surety for Collins, and that the whole of the 100*l.* was advanced to Collins as he admits, and that Harvey is liable to pay the same, and that Harvey, on or about the 23rd August instant, having lent to Collins 55*l.*, which is still due, as Collins admits, and that Harvey requested Collins to secure to him the repayment of the said two sums, it is witnessed that, in consideration of the premises, and of 5*s.* paid by Collins to Harvey, Collins did assign to Harvey, his executors, &c., all and singular his household furniture (described), stock-in-trade of every description, book debts, notes, money, and securities for money; and all other his goods, chattels, personal estate, or effects whatsoever and wheresoever (excepting necessary wearing apparel), and all right, &c., to the same, *habendum* to Harvey, &c., as his own proper goods and chattels. Proviso, that if Collins, &c., shall pay to Messrs. Gurney the 100*l.* and interest, for which Harvey became surety, and also the 55*l.* and interest at 5*l.* per cent., on the 2nd of March, or on such earlier time as Harvey, &c., shall appoint for payment thereof, by a notice in writing to Collins, &c., at least twenty-four hours before the time so to be appointed, then the assignment to be void; but in default of payment, Harvey to be entitled to enter into possession and sell the property, and to apply the proceeds in payment of the 100*l.* to Messrs. Gurney, and 55*l.* to himself, both with the interest agreed on, and to hand over the residue, if any, to Collins; and Collins appointed Harvey his attorney to recover debts, &c., due to him; and covenanted to defend him from any act done to obtain possession of the property assigned; and it was agreed that until default in payment of the 100*l.* when it should become due, or of 55*l.* after notice, Collins should *hold, make use of, and possess* the property assigned, without hindrance by Harvey, &c.

It appeared from oral testimony that the promissory note referred to in the bill of sale, was in renewal of an old note given by Collins to Messrs. Gurney which was shortly becom-

(a) Reported by J. W. M. Fonblanque, Esq.

ing due, and which Collins was unable to meet. Previous to the execution of the assignment Collins applied to Harvey for an advance of 55*l*, for the purpose of paying out an execution then on his premises. Harvey at first refused, but ultimately, on being promised security, and (as he declared in his examination) believing the bankrupt to be solvent at that time, paid 55*l* to the man in possession by way of purchase of the goods then on the premises, and took from him a receipt which he was informed would be his security until a proper instrument could be executed.

On the 27th October, Collins was adjudicated a bankrupt. Up to that date no notice had been given to him by Harvey requiring payment of the 55*l*.

The goods, subject to the assignment, had been sold by the assignees, and all necessary parties now submitted to the judgment of this Court (*a*), whether the proceeds of that sale might be paid to Harvey or ought to be retained by the assignees of Collins, the property sold being in the order and disposition and reputed ownership of the bankrupt with consent of the true owner (*b*) at the time of the bankruptcy.

Mr. *Hoggins* Q. C. for Collins. This is a valid assignment against the assignees. It was not made in contemplation of bankruptcy, nor by way of fraudulent preference, but is founded on a good and sufficient consideration. The bankrupt has had the benefit of having his property redeemed from the execution, and has so been enabled to continue his trade; the creditors will have the benefit of the trade so continued, for the deed does not pass future-acquired property; and on all these grounds it differs from one by means of which a trader puts it out of his power to continue in trade, and defeats and delays creditors.

The deed is not to be operative till default, and no default has yet taken place. Its intention is to protect Harvey, as against the bankrupt, from a contingent liability which might arise *in futuro*.

Up to the time of the bankruptcy, no default had taken place which would have given Harvey a right of possession to the property assigned; and the bankrupt, on the contrary, had a right to retain it independently of his consent: *Fenn v. Biddleston* (*c*), *Hutton v. Cruttwell* (*d*), *Graham v. Chapman* (*e*), *Gale v. Burnett*. (*f*)

Mr. *Bagley*, for the assignees. The assignment is invalid

(*a*) 12 & 13 Vict. c. 106. s. 12.

(*b*) 12 & 13 Vict. c. 106. s. 125.

(*c*) 7 Exch. 152.

(*d*) 1 Ell. & B. 15.

(*e*) 12 C. B. 85.

(*f*) 7 Q. B. 850.

1854.

EX PARTE  
HARVEY, IN  
RE COLLINS.  
Statement.

Argument.

1854.

EXPART  
HARVEY, IN  
RE COLLINS.

Argument.

against the effect of the Bankrupt Laws; it conveys the whole estate and effects as an absolute transfer, and is calculated to defeat and delay creditors, since Harvey could at any time, after giving twenty-four hours' notice, have taken possession of everything in the possession of the bankrupt. The deed is therefore itself an act of bankruptcy, and it matters not that Harvey believed (if, indeed, he did) that the bankrupt was solvent when it was executed. In *Fenn v. Biddleston* the deed was executed more than twelve months previous to the adjudication, and therefore was not an act of bankruptcy. (a) That case is not an authority in bankruptcy: the point as to order and disposition was raised, but abandoned, as the assignees had failed to obtain the order for sale, under *Hislop v. Baker*. (b)

In *Hutton v. Cruttwell* the deed was not in law an act of bankruptcy; and in *Gale v. Burnett* no question as to bankruptcy arose.

In *Graham v. Chapman* several things, including book debts, were excluded from the assignment. The deed was *bond fide*, and though for a present and past debt, the present advance was the moving consideration; yet it was held to be an act of bankruptcy, though there was no fraud in fact. So, also, where an assignment was executed under pressure, and stock-in-trade and furniture were excepted, so that some trade might still be continued, yet if its effect would be to defeat or delay creditors, even though not trade creditors, it was held to be an act of bankruptcy. (c) It has been questioned whether a mortgage deed, which provides that the mortgagor may remain in possession, is valid against assignees under the bankruptcy of the mortgagor, where the mortgagor was not solvent at the time of the execution of the deed: *Exparte Sparrow*. (d) Here it is to be inferred from the facts that the bankrupt was not solvent at the date of the assignment, and that Harvey could not have supposed him to be so.

Mr. Hoggins replied.

Judgment.  
Jan. 28.

MR. COMMISSIONER GOULBURN. In this case the submission of all parties to the jurisdiction of this Court, under the provisions of the 12th section of the late statute, enables me to pass over the difficulties which might otherwise arise as to the construction to be put upon the enactments therein, and some recent decisions which have taken place relating to re-

- (a) 12 & 13 Vict. c. 106. s. 68. See *Insolv. Rep.* 48.; *Cannan v. Smith*, 6 Exch. 740. 1 Com. Law Rep. 179.  
(b) 6 Exch. 740. (d) 2 De G. M'N. & G. 907.  
(c) *Bailey v. Barrell*, 1 Bank. &



puted ownership, and order and disposition (a), and I am enabled at once to decide the questions submitted to me, viz., whether the property in dispute belongs to Harvey by virtue of the assignment to him, or passes to the assignees of the bankrupt, as being in his order and disposition by the consent of the true owner at the time of the bankruptcy. [His Honour here recapitulated the facts mentioned above.] It becomes important to consider very carefully the effects of such deeds as that in question (which are now of very frequent recurrence), inasmuch as the tendency of them seems to be directly opposed to the spirit and policy of the Bankrupt Laws.

It has been argued at the bar that if I upheld the assignment as valid, I should be bound to decide that as the deed upon the face of it, and in its very terms, permitted the bankrupt to continue in possession, and the apparent ownership of the property until default made, the assignees would (on obtaining the order of this Court) (b) establish their title to the same as being in his order and disposition at the time of the bankruptcy.

But the answer to that view is, that here the possession is consistent with the terms of the deed, by which the true owner has deprived himself of his right to possession until default made in payment, and it has been long established that right of property and possession must be combined in the true owner, to raise the doctrine of order and disposition against him. Ample authority for this will be found in several reported cases, and especially in Baron *Parke's* judgment in *Fenn v. Biddleston*, in the Exchequer, and which I think completely disposes of that part of this case.

The only question remaining therefore is this: whether the deed in question be valid and can be upheld as against the creditors of this trader, being, as it is, an assignment of *all* the estate and effects of the bankrupt at a time when he certainly (to say the least) was in difficulties, if not clearly insolvent—as to which I shall presently advert more at length. The consideration for this deed was twofold, viz. a pre-existing liability and a new debt. The proviso in it, which postpones Harvey's right of possession until default in payment after twenty-four hours' notice only, I consider as a delusion, and merely colourable to bring the case within the letter rather than the spirit of the law. All the older authorities, which will be found collected in *Deacon's Bankrupt Law* (c), seem to establish the doctrine that such a conveyance would be void, even under the statute of

1854.  
EXPARTE  
HARVEY, IN  
RE COLLINS.  
Judgment.

(a) See *Hislop v. Baker*, 8 Exch. Rep. 411.; *Exp. Plummer*, 1 Bank. & Insolv. Rep. 83.; *Graham v. Furber*, 2 Com. Law Rep. 10.; *Exp. Barlow, Re Marygold*, 2 De G. M. & G. 921.  
(b) *Hislop v. Baker*.  
(c) 2nd edit. p. 62.

1854.  
 EXPARTE  
 HARVEY, IN  
 RE COLLINS.  
*Judgment.*

Elizabeth (independently of bankruptcy). But as regards traders, it has long been settled by all the cases, modern as well as ancient, that a conveyance like this of a bankrupt's entire estate and effects is fraudulent and void as against his creditors, and that he must be presumed to intend the necessary consequences of such an act, viz., stoppage of his trade. In a modern case, which went to the Lords Justices on an appeal from this Court, when the conveyance was executed by a trader (who was afterwards adjudicated a bankrupt) under pressure, so that there could be no question of fraudulent preference, and in which a part only of the property, and his books and book debts were conveyed by the assignment (the consideration being a bygone debt), inasmuch as so much of his property and effects was conveyed as to make it impossible for the bankrupt *permanently* to carry on his trade, such conveyance was held to be an act of bankruptcy. (a) As to *Fenn v. Biddleston* it is enough to say, that the point raised here never was raised or argued in that case. The judgment of Baron *Parke* never adverts once to it, and proceeds on a totally different point. But in *Smith v. Cannan*, in the Exchequer Chamber, an assignment very similar was held void against creditors, and in that case very much will be found bearing importantly on this question (*quod vide*). It is true that in one recent case, that of *Hutton v. Cruttwell*, a contrary view would seem to be stated by Lord *Campbell*. But the facts of that case, and particularly the finding of the jury thereon, clearly distinguish that case from the present one. The jury found there that the trader *was* solvent, and did not execute the assignment in contemplation of bankruptcy, and the case was disposed of on that finding on a motion for a new trial, and was never considered or argued before the full Court.

Here, in this case, the solvency of the bankrupt has not been established, but, on the contrary, I am satisfied from the facts and the accounts as disclosed already by the bankrupt (his balance sheet not being yet filed) that he was insolvent when the assignment to Harvey was executed, and (notwithstanding Harvey's statement to the contrary) it is clear that had he considered carefully the circumstances under which the deed was executed, and the then position of the bankrupt, he must have had, at least, a very strong doubt of the solvency of the person for whom he had become liable to the Messrs. Gurney, and to whom he advanced his money. The consideration being for a bygone liability has been held to vitiate an assignment as being fraudulent and void against the other creditors. Assign-

(a) *Bailey v. Burrell*, 1 Bank. & Insolv. Rep. 48.

ments of the whole estate have only been upheld where the consideration has been an absolute *bonâ fide* sale, or upon a present advance to the full value of the property. (a) On a full consideration of the authorities, and of all the circumstances of the case, I am of opinion that the deed is void, as having been in itself an act of bankruptcy, and that the property was rightly sold by the assignees for the benefit of the creditors.

Solicitors, *Ashurst & Son* ; *A. Burn*.

(a) *Hassell v. Simpson*, 1 Doug. 88., 1 Brown, 99.; cited in *Deacon on Bankruptcy*, p. 65.

1854.  
EXPARTE  
HARVEY, IN  
RE COLLINS.  
Judgment.

## RE WILLIAM JAMES JOHN. (b)

Before MR. COMMISSIONER MURPHY.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.  
Dec. 7.  
1853.

THE insolvent, a petitioner for protection, appeared on his final order. It was proved on the first examination that he had vexatiously defended an action which had been brought against him at the suit of the opposing creditor, and thereby occasioned some additional costs. The learned Commissioner doubted his power to deal with the offence, but suggested that the case might be argued on the day appointed for the final order.

A vexatious defence to an action, is a ground of opposition to an insolvent under the protection statutes.

Mr. *Sargood* to-day appeared for the opposing creditors. The question to be considered was, how far the Court could uphold an opposition which complained of a vexatious defence to an action. He was aware that Mr. Commissioner *Phillips* did not recognise such an offence, the reason being that it was not set forth in the Acts of Parliament: whereas the 1 & 2 Vict. c. 110., from which these statutes were partially taken, made the vexatious defence to an action a specific ground of opposition: the omission, therefore, was not a mere accident, but the deliberate intention of the Legislature. Such was the ground for the practice in that Court; but the *Chief Commissioner* had always adopted a different view of the statutes, and had always recognised the complaint of the creditor as a just ground for adjourning a case *sine die*, and looking at the express words of the preamble to 5 & 6 Vict. c. 116., which recited that the benefit of the Act was intended for persons who became "indebted without fraud or gross or culpable negligence," and construing that declaration with the power to adjourn *sine die*, contained in the 27th section 7 & 8 Vict. c. 96., there appeared ample authority to deal with the case. It never could have been the intention of the

Argument.

(b) Reported by E. H. Reed, Esq.

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RE WILLIAM  
JAMES JOHN.  
*Argument.*

Legislature to give to an insolvent, who had fraudulently and unfairly defended an action, the same advantages that would attach to an honest man, and, therefore, the Court was invested with a discretion, by section 27., to adjourn the consideration of a final order *sine die*. The express words applying to a vexatious defence were omitted from the Act, probably because it was thought that a man who unfairly defended an action, would not be so foolish as to come immediately to the Court; but if he did come, he surely was not one who, in the words of the Act, had become indebted without "any fraud."

Mr. *Caarteen*, for the insolvent, urged that the intentions of the Legislature could only be gathered from the words made use of; and as it was nowhere stated that a vexatious defence to an action was an offence against the Act, it must be presumed that it was not intended that it should be so considered. Under the present statute this offence was clearly defined, and it would be a dangerous practice to admit such an offence under the vagueness of the 27th section; because if this offence were thus admitted, there could be no objection to the admission of any other, and it would be impossible to say where offences would end, which the wording of that section would not embrace and comprehend.

*Judgment.*

MR. COMMISSIONER MURPHY said it was with diffidence he pronounced a judgment on the subject before the Court, at variance with the opinions of other Commissioners, whose experience in the practice of the Court exceeded his own: having, however, given the case his best consideration, he thought there were two principles which should be acted upon in construing Acts of Parliament, first, to take the words and give them their rational meaning; next, when doubts arose, to discover the motive of the Legislature in passing them; and upon comparing the two together, to construe the language as seemed most consistent under the intention of the Legislature. He thought in leaving out the words "vexatious defence to an action," the framers of the Act had proceeded advisedly, because it was assumed that no man would be foolish enough to put the machinery of the law in motion for an improper purpose, and come at once to the Court for relief. In deciding the question, he should be governed by the principles he had alluded to. He should read the two Acts together, 5 & 6 Vict. c. 116. and 7 & 8 Vict. c. 96., and consider their provisions as a whole. Section 4. of the former and section 24. of the latter, enumerated certain offences which, if made apparent on the first examination, deprived him of all power to name a day; but the

same sections gave him an after discretion, which was to be exercised at a subsequent period; for the Acts provided that under certain circumstances, "it shall then be lawful for the Commissioner to cause notice to be given that on a certain day, to be named therein, he will proceed to make such final order, unless cause be shown to the contrary." Giving, then, a rational construction to the language used by the Legislature, he was of opinion that on the day for the final order he was to exercise his judgment upon all the facts of the case, and if in the course of the investigation any circumstances should be disclosed or reasons appear which he thought inconsistent with the spirit of the Act, he was to adjourn the case *sine die*. Section 28. was as plain as words could make it, and was referrible to sections 27. and 24.; it contemplated as well an after discretion upon any misconduct in dealing with property or in contracting debts, as it did the naming of no day at all under section 24. He thought that the vexatious defence to an action clearly came within the scope of his after discretion. He thought so, because it was a species of fraud; it was distorting the law to a bad purpose; it was interfering with another's rights and privileges under colour of the law, and thereby causing unnecessary costs and expenses. His opinion therefore was, that a vexatious defence to an action ranged itself under that constructive legal fraud which brought it within the meaning of the words "cause shown to the contrary," and he should adjourn the case *sine die*, giving the insolvent liberty to apply under section 28. in two months. (a)

Attorneys, *Jones; Atkinson.*

(a) See *Re J. Long*, *antè*, p. 75., and *Re W. Liddelow*, *antè*, p. 186.

## EXPARTE THORNTHWAITE, IN RE PICKERING. (b)

Before MR. COMMISSIONER HOLROYD.

THIS was a sitting for the last examination. The accounts had not yet been filed. At the last meeting a proof was ten-

(b) Reported by J. W. M. Fonblanque, Esq.

against P., to which defendant pleaded (*inter alia*) payment and set-off, verdict, by consent, for plaintiff, subject to award. Arbitrator to direct that a verdict might be entered up for either party, and make directions as to costs both of the suit and arbitration. After a lapse of six years, an award was made in favour of the plaintiff for 11,000*l.* odd. Four days after the award was made, and previous to judgment being signed and costs taxed, the defendant committed an act of bankruptcy (of which the plaintiff had notice) by filing a declaration of insolvency. Judgment was signed a few days afterwards, and the defendant was ultimately adjudicated a bankrupt.

*Held*, that the plaintiff had a right to prove on the judgment entered up in pursuance of the award, notwithstanding his having notice of the prior act of bankruptcy.

On an application to expunge or reduce proof, set-off, in respect of lost documents, disallowed.

1853.

RE WILLIAM  
JAMES JOHN.  
*Judgment.*

COURT OF  
BANKRUPTCY.

Feb. 21.  
1854.

In an action  
of *assumpsit*  
on an account  
current,  
brought by T.

1854.  
 EXPARTE  
 THORN-  
 THWAITE, IN  
 RE PICKERING.

dered for the sum of 12,210*l.* on behalf of Thornthwaite, and objected to by the assignees.

The facts and arguments are set out in the judgment. Mr. *Hoggins* Q. C. for the proof.

Mr. *Linklater* (Solicitor) for the assignees.

*Judgment.*

MR. COMMISSIONER HOLROYD. In October, 1845, Thornthwaite commenced an action in *assumpsit* against Pickering (the bankrupt) to recover 17,795*l.* 5*s.*, the balance of an account current from June, 1825, to August, 1845; and the declaration contained the common count for money lent, paid, had, and received, interest, and an account stated. The defendant pleaded the general issue, the Statute of Limitations, payment, and set-off for money paid, &c. An account current had been rendered previously to the commencement of the action, to which the particulars of the plaintiff's demand referred. A bill of particulars of the set-off was delivered in the action as follows: "The particulars of the set-off in this action consist of all such items of set-off as are allowed and specified on the credit side of the account referred to in the plaintiff's particulars, and which the defendant is entitled to plead as such." On the 3rd of February, 1847, the cause came on for trial, and a verdict was taken by consent for 100,000*l.* subject to a reference to a gentleman at the bar. By the order of reference (a copy of which is in the proceedings), the arbitrator was empowered to direct that a verdict should be entered for the plaintiff or the defendant, as he should think proper, and the costs of the suit, to be taxed, were to abide the result of the award; and the costs of the reference and the award, to be taxed, were to be in the discretion of the arbitrator, and neither of the parties was to bring or prosecute any writ of error, or any action or suit at law or in equity against the arbitrator, or against each other, or concerning the matters in the order; and either of the parties was to be at liberty to make the order a rule of Court. The meetings before the arbitrator commenced in June, 1847, and went on at intervals up to May, 1850, when the arbitrator died, and in November, 1850, another arbitrator was nominated, who took up the reference, and after several subsequent meetings, and after the reference had been in prosecution for about six years, namely, on the 5th of May, 1853, an award was made in favour of the plaintiff for 11,345*l.* On the 9th of May, 1853, four days after the award was made, Pickering committed an act of bankruptcy by filing a declaration of insolvency, of which the plaintiff had notice the same day. Pickering filed the declaration of insolvency under the

advice of his attorney, not exclusively (said the attorney) to defeat Mr. Thornthwaite's judgment, though it had that object in addition to something else: it was made, however, with the knowledge of several of Pickering's creditors and the petitioning creditor. On the 12th of May, 1853, judgment was signed, and the costs taxed, and Pickering's attorney attended the taxation. No application was made to set aside the award. On the 20th of July last, at a sitting for choice of assignees under the bankruptcy, a proof was admitted on the proceedings for 12,210*l.* 17*s.* 10*d.*, leaving 12,147*l.* for damages and costs and 60*l.* 17*s.* 10*d.* for interest from the 12th of May to 29th June last, on which day the petition for adjudication was filed. The debt of the petitioning creditor was anterior to the 9th of May. The adjudication of bankruptcy against Pickering was made on the 30th of June. The application by Mr. *Linklater* to expunge this proof was made upon the ground that the judgment upon which the proof was founded was not signed till after the plaintiff (Thornthwaite) had notice of the act of bankruptcy, which was proved in support of this adjudication of bankruptcy. The question then is, whether in an action of *assumpsit* for an antecedent debt, when there is a verdict subject to a reference under an order of *nisi prius*, and an award made thereupon before the bankruptcy, but judgment not signed until after the plaintiff has notice of the act of bankruptcy upon which the adjudication of bankruptcy proceeded, a proof, made upon the judgment signed for the amount of the debt and costs, and interest from the time of signing the judgment to the date of the adjudication, can be supported. Mr. *Linklater* said the proof should have been made for the debt as it existed at the time of notice of the act of bankruptcy being given. At that time the award was made, but the judgment was not signed, and as a judgment now does not relate back, he wished it to be inferred from the cases of *Robinson v. Vale* (a), *Ex parte Birch* (b), and *Greenway v. Fisher* (c), that the judgment in this case was not properly the subject matter of a proof. He further contended that the Court was not bound by the verdict, and that judgment after the notice of the act of bankruptcy was just nothing at all, citing *Ex parte Butterfill*. (d) Here, however, we have the award as well as the verdict before notice of the act of bankruptcy; but if the award had not been made until after notice of the act of bankruptcy, according to the case of *Ex parte Helm* (e), referred to by Mr. *Hoggins*, it would have

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(a) 2 B. & C. 762.  
 (b) 4 B. & Cr. 880.  
 (c) 7 B. & Cr. 436.

(d) 1 Rose, 192.  
 (e) Mont. & M'A. 70.

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*Judgment.*

made no difference as to the right of proof. The right of proof in cases like the present is stated by the *Vice-Chancellor* in *Exparte Poncher* (a), followed in the above mentioned case of *Helm*, and in the subsequent cases of *Exparte Ferris*(b), and *Exparte Cocks*.(c) His Honour says, "It seems to me, upon authority as well as principle, that where in an action founded upon contract there is a verdict before bankruptcy and judgment afterwards, there the costs, *de incremento*, are proveable, having in effect been incorporated with the existing debt by the verdict, though not ascertained in account till the judgment." It appears, then, to me that the plaintiff, in signing judgment, was only taking the steps necessary to complete a right which was vested in him by the verdict and the award before he had any notice of the act of bankruptcy; and under such circumstances I think notice of the act of bankruptcy can have no effect against the plaintiff's right of proof upon the judgment. I think also that as interest is made by statute accessorial to a judgment debt, the interest as well as the costs became incorporated with the existing debt under the verdict and award, and formed one entire demand. For these reasons I am of opinion that the proof is right as it stands upon the proceedings. It was further urged by Mr. *Linklater*, as a ground for calling upon the plaintiff to show cause why his proof should not be expunged wholly or in part, that the assignees have a right of set-off, and from affidavits made by Mr. *Pickering* and Mr. *Smith*, his attorney, which are filed with the proceedings, it appears that the claim of set-off arises in this way: It is said that evidence was tendered before the arbitrator to establish some items of alleged set-off, but which the arbitrator refused to admit because the items were not included in the particulars of the defendant's set-off. It is also said that there were other items of a like kind in respect of which no evidence was offered before the arbitrator, in consequence of the opinion expressed by the arbitrator in reference to the items which he had refused to admit; the receipts and vouchers which were not brought before the arbitrator, and which it is said would establish a set-off, relate to matters arising principally between the years 1825 and 1833, and the latest extending up to June, 1842. These items, though not in the particulars of set-off, were embraced by the plea of set-off. The attorney says in his affidavit, that, "until after the order of reference had been made, I was unable to procure from the said William Pickering the various cheques and vouchers relating to the accounts between him and the said John Joseph Thornthwaite between the years 1825 and

(a) Gly. &amp; J. 385.

(b) 2 M. D. &amp; D. 746.

(c) 1 De Gex. 446.



1833, and which said cheques and vouchers were, as I believe, put aside by Pickering as useless and immaterial, and had been lost; and I further say, that in consequence of his inability to find such cheques and vouchers, I was unable to insert the amounts to which the same referred in the said particulars of set-off." Pickering states in his affidavit as follows: — "And I further say that all my cheques and vouchers of a date previous to the year 1833 had been put away by me as immaterial and useless long previous to the year 1845, and that such cheques and vouchers were not found by me for more than twelve months after the time at which the said John Joseph Thornthwaite brought his action for the recovery of the alleged claim, and not until after the order of reference thereof to arbitration had been made; and I was, therefore, precluded from setting out such particulars of set-off as I might otherwise have supplied." Now, it seems to me that the Court ought to be very tender in opening an award, more especially after the lengthened litigation to which I have referred; indeed, I think the Court has no jurisdiction to do so unless some special equitable ground for relief be clearly established. In the present case I think there is none, and I think the bankrupt had full opportunity to defend himself in the action. He must have known that the cheques and vouchers which he says he put away as useless had been given, and he might have filed a bill praying for an injunction till discovery, and then have pleaded his set-off, and if he did not mean to abandon those items of the account current which he omitted in his particulars of set-off, he need not have pleaded the set-off. Then, again, although after a reference under an order of *nisi prius* the Court will not, without consent, allow the particulars of demand or set-off to be amended so as to let in a new cause of action, or a new ground of defence, or an alteration of the substance of the issue, *Ashworth v. Heathcoate* (a) and *Cross v. Metcalf* (b), I think the Court would, pending a reference, allow an amendment of the particulars of demand or particulars of set-off, by adding items alleged to have accrued during the space covered by the bill of particulars delivered, if such amendment cannot have any effect upon the pleadings, or upon the wish of the parties to go on with the arbitration: *Blunt v. Cook*. (c) I think, therefore, that the defendant might have obtained an order for the items in question to be added to the particulars of set-off, and if he meant to insist upon them, I think it was his duty to do so; and if so, I think they must be taken to be within the scope of the reference just as much as if

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RE PICKERING.  
Judgment.

(a) 6 Bing. 596.

(b) 5 Ad. & El. 800.

(c) 4 M. & Gr. 458. and 5 Scott, N. C. 232.

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*Judgment.*

they had been in the particulars of set-off; and if within the scope of the reference, they cannot now be made the subject matter of a fresh claim: *Dunn v. Murray*. (a) Furthermore, as to making a set-off now against the sum proved by Mr. Thornthwaite, I think the staleness of the demand and the plea of set-off in the action constitute an answer to the application. I think, upon the authority of *Eastmure v. Laws* (b), if there had been no particulars of set-off, the verdict having been found against the defendant on the plea of set-off, he would be estopped from suing the plaintiff for the demand specified in the plea of set-off. Now the plea put in issue the same claim; it was the defendant's election to put the plea of set-off on the record, but, having done so, it must be taken, I think, that his particulars of set-off embraced the whole claim or account current which he had against Thornthwaite under the plea, and which accrued during the space of time covered by the particulars. The bill of particulars of set-off is not part of the record; its sole object is to inform the opposite party of what he ought to come prepared to try, and it precludes the party who delivers it from giving evidence of any other demand not there stated; but it seems to me that the plea of set-off must operate as an estoppel in respect of any demand covered by the plea, just as much where the defendant has abandoned any portion of an account current by confining his bill of particulars to certain items as where, like in *Eastmure v. Laws*, he abandoned the whole of his set-off by offering no evidence in support of it. The plea of set-off is substituted for a cross action. Suppose, then, that Pickering, instead of pleading his plea of set off, had brought a cross action, and had failed in such action to establish part of his claim under the account current by reason of his having omitted certain items in his particulars of demand, could it be contended that he might, at a subsequent period, and long after the termination of such action, bring another action to recover part of the claim which he had so previously abandoned? Again, if the bankrupt had any right of suing Thornthwaite in respect of the items omitted in the particulars of set-off, such right accrued more than six years ago, and as the dealings between Thornthwaite and the bankrupt do not come within the exception as to merchants' accounts within the meaning of the Statute of Limitations, any claim in respect of any such items would now be barred by the statute. (See *Inglis v. Haigh* (c), and *Cottam v. Partridge*. (d)) It appears to me, therefore, considering that the dealings between the bankrupt and Thornthwaite all took place

(a) 9 B. & C. 780.

(b) 5 Bing. N. C. 444.

(c) 8 M. & W. 769.

(d) 4 Man. & Gr. 271.

between the years 1835 and 1845, that any further inquiry upon the subject would result in a fruitless expenditure of the assets of the bankrupt's estate. I am of opinion that any claim which the bankrupt had against Thornthwaite must have been either within the scope of the reference or the plea of set-off, or be now barred by the Statute of Limitations; and as the assignees cannot be in a better position than the bankrupt, I think there is no ground whatever for the present application.

The costs of the parties will be paid out of the estate.

Solicitors, *Linklater; Lowless & Nelson.*

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THORN-  
THWAITE, IN  
RE PICKERING.  
*Judgment.*

### RE GEORGE MAITLAND INNES. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, a petitioner for protection, had inserted in his schedule a debt of 30*l.*, as owing to a Mr. Galsworthy, an attorney, for costs, incurred by reason of an omission to give notice to quit a house; he had added to the statement of the debt, "This creditor holds the joint promissory note of myself and my brother for the amount." It appeared that the note was made payable to a Mr. McCabe, the landlord of the premises, the consideration being rent that was due; it had, however, been handed to Mr. Galsworthy, as the attorney for Mr. McCabe, and he had received notice of the insolvent's petition. Whilst the case was before the Court, and after the first examination, an action had been brought upon the note by Mr. McCabe, and a rule had been obtained on behalf of the insolvent, calling on him "to show cause why the schedule should not be amended by inserting his name as the holder of the note."

Mr. *Wise* showed cause. There is no jurisdiction to make the amendment under 7 & 8 Vict. c. 96. The only sections relating to amendments are the 3rd and the 30th, and neither of them apply. The 3rd refers to misstatements in the schedule, which might be amended at the first examination, or any adjournment thereof; but the first examination of this petitioner has not been adjourned, and is altogether concluded. It is clear the amendment is to be made only on the first examination, or otherwise the creditor would not have two opportunities of opposing: *Macrae's Practice*, 458. Under section 30. an error in the amount of the debt may be amended at any time, but not in the name of the creditor. There is no authority upon

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DEBTORS.

Jan. 31.

Where an insolvent had omitted to insert the holder of a negotiable instrument, given in respect of a debt in the schedule, on a rule obtained after the first examination and before the final order to show cause why the schedule should not be amended by inserting the name of the holder, — *Held*, that the Court had power to allow the amendment at any time before the making of the final order.

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RE GEORGE  
MAITLAND  
INNER.  
*Argument.*

the point either way. He then referred to the facts in the affidavits, and contended that it was not a case for the Court to exercise a discretion if it possessed the power.

Mr. *Sargood*, in support of the rule. It would be a great hardship if the insolvent was to be deprived of his defence to this action by an unintentional error. By the 22nd section it is enacted that the final order shall protect the insolvent only from those debts which are mentioned in the schedule; or in respect of the claims of any other persons not known to the petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule. The Court must have a general jurisdiction to amend, and thus to do substantial justice where the circumstances show that there has been no intention to mislead: if the final order is granted, it will not be available to protect the insolvent, because he is now thoroughly aware that a person not in the schedule has a right of action as the holder of the note. If the amendment cannot be made, the Court must be asked to dismiss the petition. He then adverted to the circumstances of the case, contending that it was just and reasonable to allow the amendment.

*Judgment.*

MR. COMMISSIONER MURPHY. The point is one of considerable importance. If I have the power I shall certainly exercise it. I would make the final order available to protect an insolvent; and my inclination is to put a liberal construction on the powers of the Court with respect to amendments, where omissions are made in the schedule without any fraudulent or improper intention. I will consult the *Chief Commissioner*.

MR. COMMISSIONER MURPHY. I have consulted the *Chief Commissioner*, and he quite agrees with me in the view I had taken. The 22nd section provides, "That the final order shall protect the person of the petitioner from all process in respect of the several debts and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors for the same respectively; or for which such persons shall have given credit to such petitioner before the time of filing such petition, and which were not then payable; or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be indorsees or holders of any negotiable securities set forth in such schedule." Now, unless I have power to amend, in cases such as the present, where an insolvent becomes acquainted with the real claimant before the granting of his final order, he must

forfeit his protection by the accidental knowledge of truth. There must be a power to correct such an error, and to prevent the grievous injustice that would otherwise follow. I think, also, that the circumstances show this to be a fit case for the exercise of that power. And I wish it to be understood, for the future guidance of practitioners in this Court (and the *Chief Commissioner* agrees with me), that I shall hold that I am not limited to the time of the first examination to make amendments, but I shall consider that every hearing is, for the purposes of amendment, an adjournment of the first examination.

Attorney, *Galsworthy*.

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RE GEORGE  
MAITLAND  
INNES.  
*Judgment.*

### RE GEORGE SMITH. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, who had filed a petition under 1 & 2 Vict. c. 110., had been discharged out of custody on bail until the day of hearing, which was appointed for February 10th. On the 4th, and whilst he was at liberty, a discharge had been lodged at the prison by the detaining creditor. He now appeared to be heard in accordance with the provision of the bail bond.

MR. COMMISSIONER MURPHY said the case was one of great hardship, and he should consider whether he could adjudicate, the insolvent being out of custody.

Mr. *Sargood*, on behalf of the insolvent, contended that the discharge was inoperative until the insolvent had surrendered.

MR. COMMISSIONER MURPHY said he had consulted with the *Chief Commissioner*, and he considered himself bound by the words of the 38th section, 1 & 2 Vict. c. 110.: that section provided, that after an order had been made directing an insolvent to be brought up to be dealt with according to the provisions of the Act, it should be lawful for the Court, under certain conditions, to direct the insolvent to be discharged out of custody, on his finding two sufficient sureties, until the day of hearing. It further provided, "that any insolvent so discharged out of custody as aforesaid, shall, on his appearing before the said Court, or Commissioner, or Justices, be deemed and considered, for all the purposes of this Act, in the custody in which he was at the time he was so discharged." Now, in this case, the discharge had been lodged six days before the day

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THE RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 10.

Where an insolvent is out of custody on bail, until the day of hearing, and a discharge is lodged at the prison, in the interval, by the detaining creditor, the Court has no power to make an adjudication.

*Judgment.*  
Feb. 13.

1854.  
 RE GEORGE  
 SMITH.  
*Judgment.*

appointed for the hearing, and must be taken to have been duly lodged; the insolvent, therefore, was out of custody, and the Court could not adjudicate upon the case. (a)

Attorney, *Murrough*.

(a) See *Re W. Jefferies*, *antè*, p. 191.

COURT FOR  
 THE RELIEF  
 OF INSOLVENT  
 DEBTORS.

Jan. 7.

Where, in the statements set opposite to the debts in a schedule, an insolvent swears to facts which are manifestly untrue, and it appears that the object in doing so was to mislead, the Court will either dismiss the petition or adjourn the case *sine die*.

## RE GEORGE CARR. (b)

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, who described himself as a carcase butcher, appeared on his interim order for protection.

In the statements set opposite to the debts of his creditors, he alleged considerable payments to each in the course of his dealings, varying from 300*l.* to 10,000*l.* To a Mr. Holmes he alleged he had paid 7000*l.* and upwards; but Holmes, on being called, produced his books, and proved that he had not received as many hundreds.

Mr. *Reed* submitted that the petition should be dismissed; the statement of the debt was not only inaccurate, but it was manifestly untrue; and when the insolvent swore to it, he must have known that he was swearing to that which had no foundation in truth. It was important that every statement should be correct, inasmuch as the extent of an insolvent's dealings, and the amount of money he had paid to each creditor, guided the Court in adjudicating upon the case. If, for instance, an opposition was made, that the insolvent had no intention of paying for goods which he had received, the statement of payments of thousands of pounds to each creditor would naturally rebut such a case.

Mr. *Dowse*, for the insolvent, urged that the statement attached to a debt was of comparative unimportance, because it could not vary the facts as detailed in evidence. It might have been stated that a considerable sum had been paid, which would be in strict accordance with the fact; and considering the quantity of dealing between the insolvent and his creditors, he might well be misled as to the actual amount of money paid to each. The Court had ample power to amend.

MR. COMMISSIONER PHILLIPS said he should adjourn the case for three weeks. When the insolvent again came before him, he should expect proof of the alleged payments. In the meantime he should consider the objection.

(b) Reported by E. H. Reed, Esq.

No evidence being offered on this, or on a subsequent day, by the insolvent,

MR. COMMISSIONER PHILLIPS said: I had my opinion on this case when the insolvent was last before me; and it then struck me that if that which has been done was wilfully done, I either ought to dismiss the petition, or, should a day be named for the final order, to adjourn the case *sine die*. I have since consulted the *Chief Commissioner*, and he quite agrees with me in that opinion. In cases under the protection statutes, an insolvent is obliged to swear to the truth of every statement in the schedule before appearing in Court; and it has always been held, where matters appear which are manifestly false, and which the insolvent knows to be false, the Court will either dismiss the petition, or adjourn the case *sine die*. I am willing to make every allowance for the frailty of human memory, and I know that mistakes may creep into the most carefully written schedules: but when an insolvent comes before the Court, alleging as facts things which have no foundation, it requires a great deal of charity to suppose that such statements result from error or inadvertence. If it be that statements are recklessly put into the schedule, it is to impose on the Court—it is done to give the Court an impression of the fairness of the insolvent's dealings. It is of the greatest importance these statements should be correct. Suppose Mr. *Reed* complained that the insolvent never intended to pay for the meat he obtained: what is the answer? This man has gone on paying for a considerable time, and has paid thousands, leaving only a balance of 15*l.* due. How could I say, under such circumstances, that he did not intend to pay the remainder of the debt? He alleges here that he has paid Holmes 7000*l.*, but Holmes produces his books, and proves, beyond all doubt, that he has not received anything like as many hundreds. What is the ready answer? That the account runs over many years. "That can't be," says Holmes, "for I have only been in business for two." Now, it must be manifest that these statements are untrue, and set out here to impose on the Court. I shall, therefore, adjourn the case *sine die*.

Attorneys, *Pearce*; *Wright*.

1854.

RE GEORGE  
CARR.

Jan. 26.  
Judgment.

1854.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Mar. 13.

An insolvent  
must describe  
himself as  
of all places  
where he has  
resided during  
the time when  
his debts were  
contracted.

## RE JOHN BICKERTON CASH. (a)

Before the CHIEF COMMISSIONER.

THE insolvent had petitioned the Court, under 1 & 2 Vict. c. 110., and now came up to be heard.

In 1851 he had been discharged by the County Court, at Maidstone, and the earliest debt in the schedule was a balance for costs owing to a Mr. Morgan, an attorney, who had conducted his business through that Court. He had not described himself as of Maidstone.

Mr. *Morgan*, in person, objected that the description was insufficient; his debt had been contracted whilst the insolvent was a prisoner in the Maidstone Gaol, and that place must be inserted as a part of his description.

Judgment.

THE CHIEF COMMISSIONER. I think the objection is quite within the rule adopted by the Court. The insolvent must amend his description, and re-advertise.

Attorney, *Hare*.

(a) Reported by E. H. Reed, Esq.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Mar. 25.

The Court has  
no power to  
make an order  
on the provi-  
sional assignee  
to join in  
making a con-  
veyance or as-  
signment  
under sec-  
tion 68. of  
1 & 2 Vict.  
c. 110., until  
after the day  
gazetted for  
the bringing  
up of the in-  
solvent.

## RE WILLIAM P. CARTER. (b)

Before MR. COMMISSIONER PHILLIPS.

MR. *SARGOOD* moved for a rule, "That the provisional assignee be directed to join in the conveyance of the equity of redemption to certain property set out in the affidavits." The detaining creditor had obtained a vesting order, but the insolvent not having filed a schedule, no order for hearing had issued.

MR. COMMISSIONER PHILLIPS. I have no power at present to grant the motion. The 68th section ties me down to a particular time, which at present has not arrived. As no schedule has been filed there can have been no notice in the *Gazette*, and I have no power whatever in the matter.

Judgment.

Motion refused.

Attorneys, *Lewis & Lewis*.

(b) Reported by E. H. Reed, Esq.



## EXPARTE WAYMAN, IN RE MELLOR. (a)

Before MR. COMMISSIONER EVANS.

THIS was a special case submitted to the Court by the assignees of the bankrupt (Mellor) and Wayman, as to the right to certain goods seized by the latter under the provisions of a deed bearing date the 17th of February 1851, and made between the bankrupt (described as an inn-keeper) of the one part, and Wayman, the present claimant, of the other part, by which, in consideration of a previous advance by Wayman to the bankrupt of 100*l.*, and a further contemporary advance of 100*l.*, the bankrupt transferred certain premises to the claimant for the purpose of securing repayment of the advances and interest. The deed contained a covenant and grant by the bankrupt, that on default of repayment of the advances and interest the claimant might enter upon the inn and premises which then were or should thereafter be in the occupation or possession of the bankrupt, &c., and seize the goods, chattels, and effects of the bankrupt, &c., there found, and sell and dispose of the same, and out of the proceeds repay expenses, and the principal sums and interest then due in respect of the advances, and account to the bankrupt for the surplus. It was also declared, that after entry and seizure, the effects taken possession of should be deemed the absolute property of the claimant to all intents and purposes whatsoever, upon trust, for carrying the provisions of the deed into effect.

On the 1st of October 1853, the sum of 226*l.* 14*s.* was due in respect of the advances, and the claimant demanded payment of the same; but the bankrupt failed to pay. The claimant then signed an authority to an agent to enter upon the inn and premises and seize the effects there found; in pursuance of which, on the 23rd of October, the claimant's agent entered and seized, and continued in possession to the present time.

The greater part of the property seized was on the premises at the date of the deed. The remainder, to the value of 50*l.*, had been acquired subsequently to that time.

On the 26th of October the bankrupt signed a declaration of insolvency, which was filed on the 27th of the same month, upon which (as the act of bankruptcy) the adjudication was founded.

On the last-mentioned day the messenger of this Court, by virtue of the Commissioners' warrant, entered upon the premises,

1854.

COURT OF  
BANKRUPTCY.

Feb. 2.

M., in consideration of money lent and advanced to W., by deed covenanted with W., that if default were made by him in payment, W. should be at liberty to enter and take possession of the premises and effects of M., and to sell the same, and apply the purchase money in payment of expenses, and of the debt due to him, and account to M. for the surplus. M. made default in payment; and W., by his agent, entered on and took possession of the premises and effects, but did not sell. A few days after W. had taken possession, &c. M. was adjudicated a bankrupt. *Held*, that the premises and effects passed to the assignees.

*Statement.*

(a) Reported by J. W. M. Fonblanque, Esq.

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1854.  
EX PARTE  
WAYMAN,  
RE MELLOR.

and has continued in possession of the same, and of the various goods, chattels, and effects there found, being the same as those which had been taken possession of on the claimant's behalf.

The question submitted to the Court was, whether the effects, &c., passed to the assignees of the bankrupt, or remained the property of the claimant.

*Argument.*

Mr. Keene, for the claimant. The right to the property in question is to be tested by supposing an action of trover brought by the assignees, and leave and licence pleaded: in such action the defendant would obtain a verdict. The deed is good in substance, and assuming that at any time it was voidable as constituting an act of bankruptcy, it has ceased to be so now, a year having elapsed since it was made. The licence contained in the deed, being for a valuable consideration, is irrevocable.

The recent enactments have been so construed as to give extended protection to creditors holding securities: *Graham v. Furber* (a), *Dawes v. Venables* (b), *Gibson v. Muskett* (c), *Graham v. Chapman* (d), *Cannan v. Smith* (e), *Lunn v. Thornton* (f), *Wood v. Leadbitter* (g), *Winter v. Rodwell* (h), 12 & 13 Vict. c. 106. s. 133.

Mr. Ashland, for the assignees. The property passes to the assignees discharged of the power of sale. (i) The provisions of the deed on which the claimant relies is a mere licence, and gives no property or legal interest on the goods seized. The claimant (not having sold at the date of the adjudication) is a creditor having security for his debt, but not by way of mortgage or lien, and therefore can only share equally with the other creditors under the bankruptcy. (k)

The adjudication is a bar to the claimant's powers under the deed.

The statute (l) has been construed as to the present question (on corresponding enactments in previous statutes), in *Whitmore v. Robinson*. (m) The creditors protected (as referred to on the other side) are those having a mortgage or lien on specific goods. There is nothing of the kind here. The position of the claimant is similar to that of an execution creditor before actual levy and sale. No act has been done by the grantor, with regard to any specific goods, which can give the claimant a right by way of mortgage or lien. The only act which has been done is that of

(a) 2 Com. L. Rep. 10.

(b) 3 New Cases, 400.

(c) 4 C. B. Rep. 160.

(d) 12 C. B. Rep. 85.

(e) 1 Com. L. Rep. 179.

(f) 1 Com. B. 379.

(g) 13 Mee. & Wels. 838.

(h) 8 East.

(i) 12 & 13 Vict. c. 106. s. 141.

(k) Ibid. s. 184.

(l) Ibid. s. 133.

(m) 8 Mee. & Wels. 463.

the claimant, and the licence to the claimant is only good against the bankrupt personally; but he filed his declaration of insolvency to defeat the preference given to the claimant, and so transferred by act of law all his property, rights, &c., to his assignees, who are not bound by such a licence: *Lunn v. Thornton*, *Robinson v. Mc'Donnell* (a), *Freeman v. Edwards* (b), *Howes v. Ball*. (c)

1854.  
EXPARTE  
WAYMAN,  
RE MELLOR.  
Argument.

MR. COMMISSIONER EVANS. In this case a deed of mortgage of a house was put in evidence. [His Honour referred to the deed and facts as set forth above.] Under these powers the mortgagee took possession, and it is not stated in this case whether the articles seized constituted the principal stock in trade of the bankrupt, nor does it state that the mortgagee turned the bankrupt and his servants out of the house. The words of the statute (d) on the point in dispute are as follow: —“ That no creditor having security for his debt, or having made any attachment in London or any other place by virtue of any custom there used, shall receive, upon any such security or attachment, more than a rateable part of such debt, except in respect of any execution or extent served and levied by seizure and sale upon, or any mortgage of or lien upon, any part of the property of such bankrupt, before the date of the fiat or filing of a petition for adjudication in bankruptcy; provided always, that nothing herein contained shall be deemed to give validity to any warrant of attorney, cognovit, or consent to a judge's order, declared to be null and void by any provisions of this Act, nor to give validity to any judgment entered up under or by virtue of any such warrant of attorney or consent or to any execution or extent, executed or levied under or by virtue of any such warrant of attorney, cognovit, or consent.” It appears to me that the question turns on the meaning of the word “lien,” as under that only can the mortgagee be protected. I am of opinion that “lien” means, cases such as an attorney holding the deeds of his client, or a coachmaker holding a carriage till repairs are paid for. In this case the mortgagee, by the clauses in the mortgage deed already stated, had the absolute property in the goods after taking possession of them, and had not merely a lien on the goods, and I consequently think the assignees are entitled, and the mortgagee can only prove his debt.

Judgment.

It also appears to me, that if the bankrupt and his servants

(a) 5 Man. & Sel. 228.  
(b) 2 Exch. 732.

(c) 7 B. & C. 481.  
(d) 12 & 13 Vict. c. 106. s. 184.

1854.  
 EXPARTE  
 WAYMAN,  
 RE MELLOR.

were allowed to continue in the house the goods would pass to the assignees as being in the use, order, and disposition of the bankrupt: *Exparte Majoribanks* (a), *Darby v. Smith* (b), *Mace v. Cadell*. (c)

Solicitors, *Reed, Langford, & Marsden*; *George Hensman*.

(a) 1 De Gex, 466.

(b) 8 T. Rep. 82.

(c) Cowp. 233.

Note.—See *Graham v. Furber*, 2 Com. L. Rep. 452.

COURT FOR  
 THE RELIEF  
 OF INSOLVENT  
 DEBTORS.

Feb. 8.

Where an insolvent resides within a parish the distance whereof, as measured by the nearest highway from the General Post Office in London to the parish church of such parish, exceeds twenty miles, this Court has no jurisdiction.

## RE RICHARD HOLDEN. (d)

Before MR. COMMISSIONER MURPHY.

THE insolvent appeared on his interim order for protection. He had described himself as "Richard Holden, of Thorpe, in the parish of Thorpe, near Chertsey, in the county of Surrey, gardener."

Mr. *Nicholls* opposed, and proved that the distance of the parish church of Thorpe from the General Post Office in London, exceeded twenty miles, being twenty-one miles and some yards.

MR. COMMISSIONER MURPHY. I have no jurisdiction: the Act of Parliament limits my jurisdiction to twenty miles. The petition must be dismissed. (e)

Attorneys, *Turner*; *Graysbrooke*.

(d) Reported by E. H. Reed, Esq.

(e) 10 & 11 Vict. c. 102. s. 6. Vide also the form of petition as given in the schedule of 7 & 8 Vict. c. 96., and as altered upon the transfer of the jurisdiction to the Court for Relief of Insolvent Debtors and

to the County Courts, by the statute 10 & 11 Vict. c. 102., one of the allegations being, "that your petitioner has resided six calendar months within the district of this honourable Court."

COURT FOR  
 THE RELIEF  
 OF INSOLVENT  
 DEBTORS.

Feb. 10.

*Semble*, where a clear case of fraud is made against an insolvent, and he is remanded in consequence, the Court will refuse a rule nisi on the detaining creditors for an allowance under section 86. of 1 & 2 Vict. c. 110.

## RE ABRAHAM NORTH LUKE. (f)

Before THE CHIEF COMMISSIONER.

THE insolvent applied for his discharge under 1 & 2 Vict. c. 110., in December 1853, and was opposed by his detaining creditors, and remanded at their suit for a period of six months from the date of the vesting order.

(f) Reported by E. H. Reed, Esq.

Mr. *Reed* now applied on his behalf for a rule *nisi*, on the detaining creditors, to show cause why they should not make him an allowance, under section 86. of the statute. (a)

The affidavit of the insolvent disclosed extreme poverty, stating that his only means of subsistence depended on the dietary allowance at the prison, that he had no friends to whom he could apply for assistance, and that neither directly nor indirectly did he receive any assistance, and that his wife and children had no means of support, beyond a very small allowance made to them by a brother of the insolvent, who was in poor circumstances.

THE CHIEF COMMISSIONER (after referring to his notes of the case) said, I find this was a clear case of fraud, and therefore I do not think I ought to interfere.

Rule *nisi* refused.

Attorney, *Hare*.

(a) Sect. 86. 1 & 2 Vict. c. 110. enacts "That in all cases where such prisoner shall, upon such adjudication as aforesaid, be liable to further imprisonment at the suit of his creditor or creditors, or any or either of them, it shall be lawful at any time for the said Court, on the application of such prisoner, to order the creditor or creditors at whose suit he shall be so imprisoned to pay to such prisoner such sum or sums of money,

not exceeding the rate of four shillings by the week in the whole, at such times and in such manner and in such proportions as the said Court shall direct; and that on failure of payment thereof, as directed by the said Court, the said Court shall order such prisoner to be forthwith discharged from custody at the suit of the creditor or creditors so failing to pay the same."

## RE MARY ANN CANN. (b)

Before MR. COMMISSIONER MURPHY.

THE insolvent appeared on her final order. She had been residing with and assisting her father, since deceased, in the business of a coffee-house-keeper. She had no interest in the business, and only received her maintenance and clothing in return for her services. Shortly before the decease of her father, he had entered into an arrangement with one Farr, a painter, to decorate the premises. During the progress of the work, the insolvent had been called upon by her father to accept, and had accepted, a bill of exchange for 20*l.* 12*s.* drawn upon her by Farr; the bill was endorsed by her father, and returned to the drawer, who discounted it with one Burrows, who subsequently

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 14.

Where an insolvent had inserted in her schedule as creditors the several persons whose names appeared to a bill of exchange of which she was the acceptor, *Held*, that the holder only was entitled to oppose. *Held*, also, that his right to appear did not extend to a day ap-

(b) Reported by E. H. Reed, Esq.

pointed for the adjourned consideration of the final order, he not having appeared before.

1854.  
RE CANN.  
*Argument.*

endorsed it to Barnard, the present holder. Farr and Burrows appeared to oppose.

Mr. *Reed* objected to the opposition, on the ground that neither of the parties were creditors. [Mr. Commissioner *Murphy*. But they are inserted as creditors, and as such they have been served.] True, but that was to secure the insolvent from future contingencies. At present they stood in the condition of persons whose claims had been satisfied, and until they had been called upon to pay the bill, and had paid it, they had no right to complain. They could not prove against the estate, for if they could, the debt would be paid three times over, and the estate damnified; besides if they could oppose, the insolvent would be harassed with three oppositions, where only one debt existed. [Mr. Commissioner *Murphy*. As the bill has been dishonoured, is not Mr. Farr remitted to the original consideration, and could he not maintain an action?] No, because if the insolvent should pay Mr. Farr to-day, she would have no legal answer if sued by the holder to-morrow. It would be a good plea to Mr. Farr that he was not the holder. (a) [Mr. Commissioner *Murphy*. Suppose, now, I excluded Mr. Farr, and granted the final order, and that to-morrow he was called upon by the holder to meet the bill, what equivalent would he receive for being in the schedule to-day?] He would then be entitled to prove against the estate, or if the present holder had proved, he would be entitled to take advantage of his proof. (b) [Mr. Commissioner *Murphy*. I shall consider the objection.]

Feb. 15.  
*Judgment.*

MR. COMMISSIONER MURPHY said, the course he intended to adopt was this: when he found three or four persons inserted in a schedule in respect to a bill of exchange, he should hold that the creditor alone who had a legal right of action in respect to the debt was entitled to oppose. It might be in this case that the parties who sought to oppose had never received a notice of the dishonour of the bill, and thus would have a good defence to any action that might be brought against them. The holder might never seek to recover from either of them, or he might have released them both; and it would not be fair towards the insolvent to allow them to oppose when they might never have cause to complain. If, however, they should be called upon at a future time to pay the bill, and did pay it, they would then be entitled to prove against the estate; he should, therefore, hold that they were not entitled to oppose.

Mr. Barnard, the holder of the bill, now appeared to oppose.

(a) *Bason v. Arnold*, 6 M. & W. 559.; *Fraser v. Welsh*, 8 M. & W. 630. (b) Arch. Bank. Prac. 8th ed., 109.

Mr. *Reed* objected to his opposition. The Act of Parliament gave to the creditors of an insolvent two opportunities of laying their complaints before the Court,—one was the day appointed for the first examination; the other, that set apart for the final order. This was neither the one nor the other: it was an adjournment of the final order for a specific purpose. Suppose the Court had given a decision when the insolvent had last appeared, the holder then did not oppose, and the accident of the case being adjourned could not give him a third opportunity to complain, when he had neglected the two allowed him by the Legislature.

MR. COMMISSIONER MURPHY said he thought the holder was too late, and he should not entertain his opposition.

Attorney, *Charlton*.

1854.  
RE CANN.  
Judgment.

### RE ISAAC SMITH. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent had petitioned under the protection statutes.

Mr. *Lawrence* opposed, and called the attention of the Court to the allegations in the petition: "That your petitioner has not parted with or charged any of his property (except for the necessary support of himself and his family, and the necessary expenses, not exceeding £none,) of this his petition." The schedule admitted that a sum of 8*l.* had been paid to the insolvent's attorney on account of the expenses of petitioning the Court. The allegation, therefore, was untrue; and as the petition could not be amended, it must be dismissed. *Re H. J. Newburn* and *Re Adam* were in point. (b)

Mr. *Reed*, for the insolvent, said the inclination of the different Commissioners was not to sustain mere technical objections where it was apparent that the inaccuracy objected to was unintentional, and cited *Re Collis*. (c)

MR. COMMISSIONER MURPHY. My notion is not to entertain these objections; and as the schedule and petition are joined together, and sworn to as one document, where an omission appears in the one which is supplied by the other, I shall not hold such an objection fatal unless there be fraud or collusion intended.

Attorney, *Cooper*.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 15.

The Court will not dismiss an insolvent's petition where an omission appears which is supplied by the schedule, unless fraud or collusion is intended.

Argument.

Judgment.

(a) Reported by E. H. Reed, Esq.

(b) Macrae's Practice, 112.

(c) Not reported.

1854.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

March 18.

Where a creditor endeavours to make terms for himself, and threatens an opposition if those terms are not complied with, the Court will not allow him to oppose.

# RE WILLIAM PENFOLD. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, a petitioner for protection, appeared on his interim order.

He was opposed by a Mr. *Barber*, a creditor, in person; and it appearing in the course of the examination that the opposing creditor had written to the insolvent, threatening an opposition unless settled with,

MR. COMMISSIONER MURPHY said, I think the terms of the letter produced deprive Mr. Barber of all right to oppose. When a party seeks to make terms to the exclusion of the general body of creditors, and threatens an opposition if those terms are not complied with, the Court will not allow him to oppose.

Opposition disallowed.

Attorney, *Marshall*.

(a) Reported by W. H. Reed, Esq.

LORDS  
JUSTICES.

Jan. 27. 30. &  
31.

Feb. 10. & 28.  
A. and B. gave a joint and several promissory note to C., A. being principal, and B. surety. A. afterwards executed a deed of assignment for the benefit of his creditors, which deed contained a release by the creditors, without any reservation of their remedies against the sureties. C. executed this

# RE BLAKELY. EXPARTE HARVEY, EXPARTE SPRINGFIELD. (b)

THESE were two petitions of appeal against the decision of Commissioner *Fane* (reported *antè*, p. 65.), by which he rejected the proofs tendered by the petitioners against the bankrupt's estate.

The petitioners in the first petition are bankers at Norwich, carrying on business under the firm of Harveys and Hudson. In 1850, E. T. Blakely, the son of the bankrupt E. Blakely, became one of their customers. Having considerably overdrawn his account, he wished for further advances, which Messrs. Harveys and Hudson agreed to make on having the amount guaranteed by the father. E. Blakely accordingly gave to Messrs. Harvey a written document, dated 28th of November 1850, by which he guaranteed to them the repay-

(b) Reported by H. C. Jones, Esq.

deed with the privity and approbation of B., and on the understanding that his remedies against B. were not to be prejudiced. C. and two others, who, with him, were trustees of the deed, were the only creditors who executed it; and A. was soon afterwards adjudged bankrupt, the execution of the deed being the act of bankruptcy. A few days after the execution of the deed, B. committed an act of bankruptcy, and was adjudged bankrupt. *Held*, reversing the decision of the Commissioner (1 Bank. & Insolv. Rep. 65.), that C. was entitled to prove on the note against the estate of B.



ment of the balance to become due from E. T. Blakely, to an amount not exceeding 2500*l*. The account of E. T. Blakely was in 1852 overdrawn to an amount considerably exceeding this sum, and the bankers were at the same time the holders of two bills of exchange for 300*l*. and 230*l*., which they had discounted for E. T. Blakely, being bills drawn by E. T. Blakely upon, and accepted by, E. Blakely. On 14th of December 1852, the guarantee and the two bills of exchange were given up by the bankers to E. Blakely, and the two Blakelys gave to the bankers a joint and several promissory note for 3030*l*., being the aggregate amount of the two bills of exchange, and of the unsecured balance of E. T. Blakely's account at that time. Both the Blakelys having afterwards become bankrupt, Messrs. Harveys and Hudson sought to prove against the estate of E. Blakely on the above promissory note for the sum of 2857*l*. 7*s*. 6*d*., the ultimate balance of E. T. Blakely's account.

1854.  
RE BLAKELY.  
Statement.

The petitioner Mr. T. O. Springfield, and his partner, sought to prove against E. Blakely's estate for the moneys remaining due upon several bills of exchange which had been accepted by E. T. Blakely, and indorsed by E. Blakely as his surety for securing to Mr. Springfield and his partner the payment of the price of certain goods supplied by them to E. T. Blakely.

The original liability of E. Blakely, in respect of both demands, was not disputed, but his assignees contended, that under the circumstances hereafter mentioned, he had been released from it.

On the 29th of March 1853, E. T. Blakely executed an indenture of that date, expressed to be made between E. T. Blakely of the first part; T. O. Springfield, R. J. H. Harvey, and William Starke, "trustees for themselves and the rest of the creditors of the said E. T. Blakely parties hereto of the second part; and the several other persons whose names and seals are hereunto subscribed and set, being respectively creditors of the said E. T. Blakely, of the third part;" by which he assigned all his personal estate to the trustees upon trust, to collect it, and, after paying the expenses, "to pay, retain, and satisfy, rateably and proportionably, and without any preference or priority, to themselves the said trustees and their partners, and the other persons, parties hereto of the third part, the said several sums set opposite to their respective names in the said schedule hereto, subject to the covenant hereinafter contained for verifying the amounts thereof, and to pay the residue (if any) of the said moneys unto the said E. T. Blakely, his executors, &c." The deed then contained various provisions which it is not necessary to state, and concluded with the following release: "The said

1854.  
 RE BLAKELY.  
 Statement.

several creditors, *parties hereto of the second and third parts*, subject to the proviso next hereinafter contained, do, and each of them doth hereby acquit, release, &c., the said E. T. Blakely of and from all and all manner of debt and debts, &c., which they, the said releasing parties, or any or either of them, *their or any or either of their partner or partners*, now have, or hereafter may have, against the said E. T. Blakely, his executors or administrators, for, or in respect of any debt, transaction, matter, or thing, up to the day of the date hereof," subject to a proviso for making the release void, if E. T. Blakely had secreted property (other than linen and wearing apparel) to the value of 20*l*.

This deed was some time afterwards executed by the three trustees, Springfield, Harvey (who was a member of the firm of Harveys and Hudson) and Starke, in the common form, no debts being specified as due to them. Harvey executed it on the 7th of April. It did not appear at what time it was executed by the two others. Annexed to the deed was a schedule prepared for receiving in the usual way, in columns, the signatures and seals of the creditors, and the amounts of their respective debts. This schedule remained wholly blank, no creditor, except the three trustees, having ever executed the deed, and none of the names of the trustees having been inserted in the schedule.

On 9th of April 1853, a petition for adjudication was filed against Edward Blakely, grounded on an act of bankruptcy committed by him three days previously, and he was adjudged bankrupt. On 28th of April 1853, a petition was filed against E. T. Blakely, under which he was adjudged bankrupt; the act of bankruptcy being his execution of the above-mentioned indenture.

There was much conflicting evidence as to the circumstances under which the deed was executed by Mr. Harvey and Mr. Springfield. Messrs. Harveys and Hudson's case was, that E. Blakely was privy to the execution of the deed, and that they declined to have anything to do with it, unless on the express understanding that he was not to be discharged; and they proved a memorandum, signed and delivered to them by him, on 7th of April 1853, in these words: "Dear Sirs, I request you will take 10*s*. in the pound on my son's estate; as to the residue I hope to be able to satisfy you myself." E. Blakely, on the other hand, deposed that he never assented to the deed, and knew nothing of it for some time after its execution; that there was no understanding such as was alleged by Messrs. Harveys and Hudson, and that he signed the memorandum under the idea that it referred to an entirely different arrangement,

which had been proposed for settling his son's affairs, and without any reference to the above-mentioned deed.

Mr. Springfield was a party to the preparation of the deed, and he deposed that E. Blakely was privy to the whole transaction, and was very anxious that his son's affairs should be wound up in that way, to prevent his becoming bankrupt. He deposed, also, that E. Blakely had requested him to take steps to procure the concurrence of Messrs. Harveys and Hudson in the arrangement; and had mentioned, as a reason for their concurring, that their rights against himself would not be prejudiced; and had subsequently, down to the time of his bankruptcy, during the course of frequent communications with Springfield, spoken of the deed as not affecting his own liability.

Mr. *Swanston*, Mr. *Rolt*, Mr. *Bazalgette*, and Mr. *Prentice* (of the Common Law bar), for Messrs. Harveys and Hudson.

Harvey executed this deed only as a trustee, not as a creditor, and so did not release this debt at all. His affidavit is express as to that being his intention; no debt is specified as due to him; and he does not execute in the schedule, which was the part of the deed for the signatures of creditors. [Lord Justice *Turner*. Surely he would not, in any case, execute twice. The language of the deed is against you; the parties of the third part are referred to as "other persons."] If Harvey had executed as a creditor that would have appeared on the deed in some form. [Lord Justice *Knight Bruce* referred to the recital in the deed, that E. T. Blakely was indebted to the parties of the second and third parts; and observed that Harvey was not a creditor, except as a member of his firm; and that the deed purported to release debts due to the parties or their partners.] It is doubtful whether a release by one partner is effectual for this purpose: *Smith v. Winter*. (a)

But, suppose Harvey did execute as a releasing party, the release was void, for the assignment became void by being the foundation of the bankruptcy: *Simpson v. Sykes* (b); and the release, being made in consideration of this void assignment, must be void also: *Bac. Ab.* "Covenant," G., *Com. Dig.* "Covenant," F. It is true, that between the execution of the deed and the adjudication the deed would have apparent validity; but on adjudication coming, its invalidity would relate back: *Garland v. Carlisle*. (c) [Lord Justice *Knight Bruce*. How do you deal with this interval? The right of action would be suspended. Would not that hamper the father, and so release him, if only a surety?]

(a) 4 M. & W. 454. See the judgment, p. 466.

(b) 6 Mau. & Selw. 295.

(c) 4 Moo. & Scott, 24.

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It is contended, on the other side, that E. T. Blakely's bankruptcy is void, for that the petitioning creditor had assented to the deed, and could not treat it as an act of bankruptcy: *Tope v. Hockin* (a); but, in fact, his assent was only conditional, and the condition was not performed. Moreover, the validity of the adjudication against E. T. Blakely cannot be questioned in the present proceeding.

We contend, therefore, that whether the father was a principal or only a surety, he was not released at law; for Harvey, if he executed a release at all, executed one which became invalid upon the bankruptcy of E. T. Blakely.

But, suppose Harvey executed as a releasing party, and that his execution was effectual, we contend that the father was not released; for

1. He was not a surety, but a principal debtor. He was originally indebted to us on the bills of which we were the holders, and which we gave up on his joining in the note on which we now seek to prove. It is said, on the other side, that they were accommodation bills; but we were holders for value without notice, so the father was, as regards us, a principal debtor. The advance of 750*l.* to him, on insufficient security, was part of the consideration for the promissory note. The object of this note was to make both father and son principal debtors to us for the whole amount: *Chitty on Contracts* (b), *Williams v. Leper* (c), *Brooks v. Haigh* (d), *Castling v. Aubert*. (e) Now, the releasing one of two principal debtors, jointly and severally bound, cannot release the other: *King v. Hoare*. (f) The father's being a principal answers the difficulty suggested by one of your Lordships as to the interval between the execution of the deed and E. T. Blakely's bankruptcy. The suspension of the right of action, even if it could release a surety, could not release a co-principal.

2. Even if the father was a surety only, he is not released, for he assented to the deed. His letter of the 7th of April proves this. [Lord Justice *Knight Bruce*. Need the surety enter into any express agreement, if he be known to approve of the transaction?] We submit not: *Samuell v. Howarth*. (g) [Lord Justice *Knight Bruce* referred to *Clark v. Devlin*. (h)] The Commissioner rejected the proof on the ground that the reservation of the remedy against the surety ought to have appeared on the

(a) 7 B. & Cr. 101.

(b) P. 512.

(c) 3 Burr. 1886.

(d) 10 Ad. & Ell. 323.

(e) 2 East. 325.

(f) 13 M. & W. 494.

(g) 3 Mer. 272.

(h) 3 Bos. & Pul. 363.

face of the deed; and that, as it did not so appear, it would be a fraud on the other creditors to give effect to it. We admit that, if an arrangement is made between the principal and the creditor only, the reservation of the remedy against the surety must appear on the deed; but we contend that, if the surety is a party to the arrangement, such reservation is unnecessary as regards him: *Mayhew v. Crickitt* (a), *Tyson v. Cox* (b), *Wyke v. Rogers*. (c) Then, as to the other creditors, there is no fraud on them; they could not be damnified, for the acquiescence of the surety in the arrangement would destroy his remedy against the principal.

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Mr. *Daniel* and Mr. *Aspland* (of the Common Law bar), for the assignees of Edward Blakely (the father).

During the interval between the execution of the deed and the adjudication, the trustees carried on E. T. Blakely's business, with the concurrence of the petitioning creditor, who thus lost his right to treat the deed as an act of bankruptcy. We are at liberty to dispute the validity of the adjudication against E. T. Blakely. It is true we have proved under his bankruptcy, but we cannot be estopped by that, for it was our only means of placing ourselves in a position to discover whether there was a valid adjudication.

But, suppose the adjudication valid, the deed of assignment was only voidable, not void: *Newnham v. Stevenson*. (d) The right of Harveys and Hudson against the principal was taken away by that deed, so as not to exist between its execution and the adjudication. During that time, then, the liability of the surety was also gone, and nothing to which he was not a party could revive it: *Bellingham v. Freer*. (e) [Lord Justice *Knight Bruce*. Suppose we hold that Harvey executed the deed only as a trustee, and not as a releasing party. In that case, the debt due to his firm, if released at all, was released in equity only. Then, considering that no creditors executed as creditors, and that no sum was mentioned in the schedule, is this a case in which a Court of Equity can hold that there was a contract to release?] The creditors who, though they did not actually execute the deed, assented to it, have a right to insist that Harvey is bound by it in his character of creditor. That the amount of the debt is not mentioned makes no difference: *Harrhy v. Wall*. (f) The words of the release include *all* debts, not merely debts in the schedule: see *Graham v. Achroyd*. (g)

(a) 2 Sw. 185.

(b) T. & R. 395.

(c) 1 De G. M. & G. 408.

(d) 10 C. B. 713.; in error 13 C. B. 285.

(e) 1 Moore, P. C. C. 333.

(f) 1 B. & Ald. 103.

(g) 10 Hare, 192.

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Then, as to the other points: 1. The father was not a principal debtor, and even if he was, he is released: *King v. Moore* (a), *Bailey v. Haines* (b), *Clayton v. Kynaston* (c), *Nicholson v. Revill*. (d) A right of action once suspended is gone for ever: *Beech v. Ford*. (e) Here the right of action was suspended from the execution to the bankruptcy. The remedy on the note, then, is gone; and the claimants cannot resort to the original consideration, for they obtained the note in consideration of giving up the former notes and the guarantee. They did not acquire a new remedy for recovering an old debt, but took a new right in lieu of an old one.

It is said that E. Blakely was such a party to the execution of the deed by the son, as to preclude him from contending that the deed released him. But this deed does not purport to reserve any remedies against sureties or persons otherwise liable with the assignor. A reservation of such remedies not on the face of the deed is void as a fraud on the other creditors: *Cockshott v. Bennett* (f), *Ex parte Glendinning* (g), *Cullingworth v. Lloyd*. (h) *Wyke v. Rogers* (i) is not against us, and the observations of Lord St. Leonards in that case support our view of the present case. [The observations in *Espey v. Lake* (k), and *Tuck v. Tooke* (l), were also referred to.]

That Harvey executed as a releasing party is clear on the face of the deed, and evidence is not admissible to show that he did not intend to do so: *Cocks v. Nash*. (m)

Mr. Swanston, in reply. The execution of the deed by Harvey as trustee does not release the debt due to his firm: *Bain v. Cooper*. (n) The deed was never intended to have any operation upon the debts till all the creditors had come in.

The surety is not released, the intention being that he should remain bound: *Thompson v. Black*. (o) [Lord Justice Knight Bruce. That case is an authority for you, if you can show such intention on the face of the deed, not otherwise.] Or, if the language of the deed is consistent with the reservation of the remedy against the surety. [Lord Justice Knight Bruce. I am not at present prepared to go so far as that.]

Again (supposing the father not a surety), the father and son are jointly and severally bound; the release, supposing there is a valid release at all, discharges the father from his joint

(a) *Ubi supra*.

(b) 15 Q. B. 533.

(c) 2 Salk. 573.

(d) 4 Ad. & Ell. 675.

(e) 11 Q. B. 852.

(f) 2 T. R. 763.

(g) Buck 517.

(h) 2 Beav. 385.

(i) *Ubi supra*.

(k) 10 Hare. 265.

(l) 9 B. & C. 437.

(m) 9 Bing. 341.

(n) 9 M. & W. 701

(o) 3 C. B. 540.

liability, but cannot operate as a release of his separate liability. A covenant not to sue one of two principal debtors, jointly bound, does not discharge the other: *Dean v. Newhall* (a), *Cocks v. Nash*. (b)

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As to the reservation of the remedy against the surety being a fraud on the creditors, no creditors have been injured. [Lord Justice *Knight Bruce*. Is that necessary? Is not the principle this, that each creditor is assumed to have an interest in giving to the insolvent the full benefit of the arrangement?—not that I am aware of any case where that principle has been specifically applied.] It is submitted that such is not the principle.

Mr. *Swanston* and Mr. *Palmer* (of the Common Law bar), for Mr. Springfield.

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Mr. *Daniel* and Mr. *Aspland*, for the assignees.

For Mr. Springfield it was contended, in addition to the arguments used in *Harvey's* case, that if this deed had been executed by six sevenths of the creditors, who need not have executed at the same time, it would have come within sect. 224. of the Bankrupt Law Consolidation Act, and would not have released the sureties; and that it would be absurd to hold that the sureties were released, no creditors having come in, when they would not have been released, if a certain number of creditors had come in. The only reasonable construction must be, that if the deed becomes invalid by bankruptcy, matters stand as if it had never been executed; that the Commissioner had admitted the proof against the son, and the deed could not be void for one purpose and good for another; that the bill to Springfield did not become payable till after E. T. Blakely's bankruptcy, so that the difficulty with which the Court felt pressed in *Harvey's* case, as to the suspension of the right of action, did not apply here. *Tetley v. Taylor* (a) was referred to on the question whether the deed could come within section 224. of the Act, which the assignees contended that it could not.

LORD JUSTICE KNIGHT BRUCE said that these petitions involved questions of fact more difficult than any point of law or equity involved in them; the affidavits, on one side or the other, manifestly containing some more or less incorrect statements. His Lordship then shortly alluded to the nature of Messrs. Harveys and Hudson's claim, and of the defence set up; and said that as the bankruptcy of the son was in force, he

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(a) 8 T. R. 168. (b) 9 Bing. 341. (c) 1 Ell. & Bl. 54. 521.

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should give no opinion whether the petitioning creditor could treat the execution of the deed as an act of bankruptcy. One point taken against admitting the proof was, that the father joined in the note only as surety for the son, but this would be immaterial, if the father, before committing an act of bankruptcy, had notice of and approved of the composition deed. Then ought it, or ought it not, on the evidence, to be believed, that such was the case? The petitioners asserted it, the respondents denied it, and the evidence was conflicting; but the knowledge and assent of the father were probable, and might justly be inferred from the undisputed facts of the case. His Lordship thought, therefore, that such notice and assent were to be considered to have existed.

His Lordship then proceeded to observe, that the deed was never completed, but the arrangement fell to the ground; it was not executed by Mr. Harvey till the 7th of April, and within a month from that time the son was adjudged a bankrupt. The trustees were also creditors, though Harvey was only a creditor in the capacity of a member of the firm to which he belonged; he, however, executed the deed both as trustee and creditor. The deed was not executed by any creditor except the trustees; it did not specify any debts, and no dividend ever was paid under it. The bankruptcy of the son was grounded, and must be taken to have been duly grounded, on the execution of it. Harvey must be taken not to have executed it with an intention to release the father. His Lordship thought that no party had supposed it would have that effect. It might have been so framed as to make it manifest that the father could not claim to be released; and it was plain, that Harvey would not have executed it, unless altered in that way, if he had been informed that in its actual form it would operate as a release of the father. If the deed did not at law release the father, it could not in equity; if it did do so at law, yet it did not in equity; for a Court of Equity could, if necessary, reform the deed. It must, therefore, be declared, that Messrs. Harveys and Hudson had the same right of proof as if Mr. Harvey had never executed or known of the existence of the deed, and were entitled to their costs, except such as were caused by their employing a superfluous number of counsel, and by a charge of abstracting property, which charge had not been sustained. The defence was not founded on justice. The equity of the case, not only in the judicial, but in every sense of the term was with the petitioners, and the failure of the defence was most complete.

His Lordship then said that the same reasoning applied to



Springfield's petition, and that a similar order must be made on that. It was in his Lordship's opinion immaterial whether the father was a principal debtor or only a surety, or whether the 228th section of the Bankruptcy Consolidation Act had any bearing on the question or not.

LORD JUSTICE TURNER said that the case could not be put more strongly against the petitioners than by assuming that the father was only a surety, and that the trustees executed the deed as creditors as well as trustees, and he should deal with the case on that footing. It was then to be considered whether the father concurred in the deed, or assented to it, before committing an act of bankruptcy. If he did, there was no serious difficulty in applying the law to the facts of the case. His Lordship then went through the evidence, and stated his conclusion from it to be, that the father concurred in the execution of the deed by Mr. Harvey, on the footing that he himself was to remain liable, and that he ratified Mr. Springfield's having executed it on that understanding. Now, it was not disputed that a surety, who concurred in an arrangement between the principal and the creditor, was not discharged by such arrangement; but it was said, that the effect of this deed of release, containing no reservation of the remedies against sureties, was to discharge him. His Lordship, however, was disposed to think that it was in some cases necessary that the reservation should appear on the face of the deed, in others not; but, at all events, the omission of such express reservation was not enough to deprive the petitioners of their independent equity, arising from the fact, that they executed the deed at the request of the surety, who, therefore, could not claim to be discharged. The case differed in its circumstances from *Lee v. Lockhart* (a), but the remarks of the *Lord Chancellor* in that case, bore strongly upon it. It was there said, "The decisions referred to proceed upon clear and intelligible principles; but they do not appear to me to have any application to the present case, in which the only question is, whether a person having a valid security for his debt, but induced by the debtor to execute an instrument legally affecting such security, under a representation that such would not be the effect, and a promise that it should not, is, upon the application of such debtor, to be held to be deprived of such original security. I am clearly of opinion that he cannot be considered as so deprived." His Lordship was, therefore, of opinion, that the proofs must be admitted, and that the costs, with the exception

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(a) 3 M. & C. 302.

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adverted to by Lord Justice *Knight Bruce*, must be paid out of the bankrupt's estate.

Solicitors, *Sole, Turner, & Turner; Reed, Langford, & Marsden.*

LORDS  
JUSTICES.  
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Section 160. of the Bankruptcy Consolidation Act, 12 & 13 Vict. c. 106., empowers the Court to make an allowance "to such person as the Court shall think fit" for the preparation of the balance-sheet and accounts of a bankrupt. Held, that the preparation of such balance-sheet and accounts by the official assignee was inconsistent with the duties of his office, and that sums allowed to him under the above section by the Commissioner for such preparation must be disallowed.

*Statement.*

### EXPARTE RUSSELL, IN RE MINNITT. (a)

THIS was a petition by the trade assignee against the allowance to the official assignee of two sums of 15*l.* and 6*l.*, which he charged for preparing the bankrupt's balance-sheet, cash account, and sale account.

It appeared from the affidavit of the official assignee, that some months before the present bankruptcy, Mr. Balguy, one of the Commissioners for the Birmingham district, had directed, that when it was necessary for the bankrupt to have assistance in preparing his balance-sheet, it should be prepared in the office of the official assignee. This practice had prevailed for some time in the Leeds district, and was thus introduced into the Nottingham division of the Birmingham district. On the 21st of November 1853, the bankrupt applied, in writing, to the Commissioner to have his balance-sheet prepared in the official assignee's office, and the costs paid out of the estate, which application was granted.

On the 17th of March 1854, the accounts of the official assignee were audited, and the Commissioner allowed the charges in question, and also allowed a sum of 20*l.* to the official assignee for examining the balance-sheet and cash and sale accounts. The petitioner, shortly afterwards, on discovering the allowance of the two items amounting to 21*l.*, protested, and signified his intention of bringing the point before the Court of Appeal.

On the 24th of March 1854, a memorandum was signed by Mr. Balguy, and entered amongst the proceedings in this bankruptcy, which was as follows:—

"In the matter of Thomas Minnitt, a bankrupt, this 24th day of March 1854. The balance-sheets and accounts filed in this Court, having been frequently found to be most unsatisfactory, and the consequent adjournments and costs very detrimental to the estates of bankrupts, and to the dividends of their creditors, and the 160th clause of the Bankrupt Law Consolidation Act having given to the Court the power, on the application of an assignee or of a bankrupt, of making an

allowance out of the estate for the preparation of such balance-sheets and accounts, and to such person as the Court shall think fit, it has been thought expedient to give a trial to the practice, for some years pursued in the Leeds district, to direct such balance-sheets and accounts to be prepared in the office and under the superintendence of the official assignee, and to grant to him a moderate remuneration for such additional services. And upon the application of the above-named bankrupt, and being satisfied that he required assistance in the preparation of his accounts, I having required Mr. John Harris, the official assignee of this Court, to give such assistance, and taking into consideration that the usual charge of accountants so employed will vary from 20*l.* to 100*l.* and upwards, I do now direct that the sum of 21*l.* be allowed in his accounts, under the 160th section of the Bankrupt Law Consolidation Act, as a moderate and just, and a further remuneration to him for the services thus rendered to my satisfaction. "J. BALGUY."

The petition asked that the 21*l.* might be disallowed, and, if not, then that the 20*l.* allowed for examining the balance-sheet and accounts might be disallowed, and that the official assignee's account might be re-audited.

Mr. *W. M. James* and Mr. *Hardy*, for the petitioner. We do not dispute that 21*l.* is a very moderate charge, but we contend that the official assignee is an officer of the Court, whose duty it is to watch the conduct of the bankrupt, and that he therefore ought not to be allowed to transact business on the bankrupt's retainer. The 160th section of the Act (a), taken as a whole, does not authorize what has been done. [Lord Justice *Knight Bruce*. That section seems to say that the bankrupt is to prepare the balance-sheet by himself or his agent—it is to be his act.] Rule 130. provides that the official assignee is to be paid for

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(a) "That the bankrupt shall prepare such balance-sheet and accounts, and in such form as the Court shall direct, and shall describe such balance-sheet and accounts, and file the same in Court, and deliver a copy thereof to the official assignee, ten days at least before the day appointed for the last examination, or the adjournment day thereof, for that purpose; and such balance-sheet and accounts before such last examination may be amended from time to time as occasion shall require and such Court shall direct; and the bankrupt shall make oath of the truth of such balance-sheet and accounts whenever he shall be duly

required by the Court so to do, and the last examination of the bankrupt shall in no case be passed unless his balance-sheet shall have been duly filed as aforesaid; and the Court may, on the application of the assignees, or of the bankrupt, make such allowance out of the estate of the bankrupt for the preparation of such balance-sheet and accounts, and to such person as the Court shall think fit, in any case in which it shall be made to appear to the satisfaction of the Court, from the nature of the accounts or other good cause, that the bankrupt required assistance in that behalf."

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examining the bankrupt's accounts; *i. e.* such accounts as are rendered under section 160. This shows that the examination of the accounts is an important part of the duties of the official assignee, and he therefore is not a proper person to prepare them. Then Rule 122. forbids the official assignee to carry on any business on his own account. The practice now complained of makes him carry on business as an accountant. If he prepares the balance-sheet, he is naturally disposed to insist on its accuracy, and becomes, in fact, the advocate of the bankrupt, which is directly inconsistent with his official duties. It appears, from the affidavit of the petitioner, that such has been the result in this case. The official assignee has opposed the rendering of further accounts, which the Court, nevertheless, ordered to be rendered. If the official assignee is paid for preparing the balance-sheet, he ought not to be paid for examining it, such examination being a mere form when he has prepared it. [Lord Justice *Knight Bruce*. The answer to that will be, that he has prepared for 21*l.* accounts for which an accountant would have charged 40*l.*; and that may be quite true. Still I don't understand a man's having to sit in judgment on his own work.]

Mr. *Bacon* and Mr. *Prior*, for the official assignee. The rule adopted by the Commissioner is one which he had jurisdiction to adopt under section 12. of the Act. It is a wholesome rule, for it saves great expense to the estate. The official assignee employs a clerk on purpose to make out the balance-sheets, and makes no profit, his charge being barely sufficient to pay the clerk. To say that he becomes the advocate of the bankrupt is a wholly unfounded charge; he is neither retained nor paid by the bankrupt, and has no motive to make out the accounts too favourably for him. There is no difference in substance between his making out the account in the first instance and his examining and settling it when made out by the bankrupt—he is doing the same thing at a different stage. This course greatly facilitates the realizing the estate, as it avoids the necessity of waiting for information till the balance-sheet has been carried in. There is also this advantage, that the balance-sheet is prepared by a disinterested person instead of by the bankrupt and an accountant employed by him. The language of the 160th section is quite wide enough to include the official assignee, and the 127th Rule obviates the objection founded on the 122nd.

*Judgment.*

LORD JUSTICE KNIGHT BRUCE. There can be no doubt that this is a difficult and perplexing Act of Parliament, and it

is no wonder that different opinions should be entertained on various parts of it. The section in question has never, so far as I recollect, been brought under my attention on any former occasion; and the question we are now called upon to decide is, whether the official assignee is a person who can become entitled to an allowance under it. It is said that he may, under the generality of the words "such person as the Court shall think fit," but I think that it is against the spirit and policy of the Act, considering the position and duties of the official assignee, to say that he comes within these words. I am of opinion that he does not come within them, and that, according to the safe, wholesome, and legitimate interpretation of this section, he cannot receive an allowance for the preparation of the balance-sheet. As the Commissioner has proceeded solely on this section, the items in dispute must be struck out on this ground only, that the allowance of them was based upon a construction of the statute to which we cannot accede.

LORD JUSTICE TURNER. In disposing of this case, I do not proceed on any supposition that undue favour has been shown to the bankrupt, or that injury has been done to his estate, but solely on the ground of an important general principle. The Act provides that the Court may make such an allowance for the preparation of the balance-sheet and accounts, and to such person, as the Court shall think fit, in any case in which it shall be made to appear to the satisfaction of the Court that the bankrupt required such assistance. The question is, whether it is or can be, consistently with the provisions of the Act, a sound exercise of the discretion of the Court to make such allowance to the official assignee. This must be determined by considering what are the duties of the official assignee. According to the earlier part of the same section, the bankrupt is to prepare such balance-sheet and accounts, and in such form as the Court shall direct; and is to file the same in Court, and deliver a copy to the official assignee at least ten days before the day appointed for the last examination. The accounts then are to be delivered to the official assignee, which evidently is directed to be done in order that he may examine and check them. The bankrupt is to make out the accounts; the official assignee has possession of the bankrupt's books, which have to be delivered to him; and it is then his duty to check the accounts. This being so, what are the principles applicable to the case? There are several cases which show them. Take the practice of Courts of Equity as to the appointment of a receiver. It has long been a settled rule that no Master of the Court could be appointed a receiver,

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because it was part of the official duty of a Master to check the accounts of receivers; and though he might have nothing to do with the accounts of that particular estate, the Court held that it would be unsafe to allow him to act in that capacity. Again, in the case of a lunatic's estate, it is a settled rule that the committee shall not be appointed receiver. A still more analogous case to the present is the case in which the creditors of a bankrupt had so much confidence in him, that they appointed him assignee of his own estate; but the Court removed him, on the ground that his duties as assignee were inconsistent with his position as a bankrupt. So, in the present case, the duty of preparing the balance-sheet is inconsistent with that of examining it.

It has been said that the effect of a decision against the rule of the Commissioner will be to throw the estates of bankrupts into the hands of accountants, to the injury of the creditors. I have too much confidence in the Commissioners to apprehend any such result. I am satisfied that they will exercise a sound discretion as to making allowances out of the estates of bankrupts for the preparations of the accounts. Again, it has been argued that no evil can arise from the rule laid down by the Commissioner, as the items of the accounts have to be vouched. But this is a short-sighted view; for if the first accounts rendered by the bankrupt are insufficient, a further account will be called for; and if the official assignee has been employed to make out the accounts, he cannot, in dealing with the further accounts, avoid a bias arising from the fact of its having been his duty to make the first accounts complete.

There is another circumstance in this case to which I must advert. I think that it is the duty of the Commissioner to determine in each particular case whether the expense of preparing the balance-sheet and accounts ought to be allowed out of the estate, and that the laying down any general rule on that head is in contravention of the Act, as interfering with the exercise of that discretion which the Act intended to be exercised by the Commissioner. The items objected to must, therefore, be disallowed; but, under the circumstances, the costs of both parties will be given out of the estate.

Solicitors, *Reece & Wythe; Sharp, Field, & Jackson.*

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## EXPARTE BATEMAN, RE BURBURY.

THE solicitors of the assignees of a bankrupt had their bills of costs taxed in March 1851, by the Registrar of the District Court of Bankruptcy at Birmingham. The taxation was made *ex parte*, without notice to the assignees. In April 1853, the assignees and several of the creditors applied to the District Court for a re-taxation of the bills which had not been paid: *Held*, (reversing the decision of the Commissioner) that such re-taxation ought to be ordered.

Whether the registrar of the District Court had jurisdiction to tax the bills, *quære*?

[For a report of this case, see 2 Eq. Rep. 11.]

1853.  
LORDS  
JUSTICES.  
Nov. 4.

## EXPARTE WOOD, RE WOOD.

THE 79th section of the Bankrupt Law Consolidation Act, 1849, gives to the Court a discretion as to whether a bond with sureties is to be required; in exercising which discretion regard is to be had, not merely to the solvency of the alleged debtor, but to the origin and nature of the demand, and the probability of its being such as the claimant can succeed in enforcing. In a case, therefore, where the alleged debt was the balance of an account of transactions purporting to be purchases and sales of tallow, but there was great doubt whether they were not in reality mere time bargains and void at law, as being in the nature of wagers: *Held*, that a bond ought not to be required.

[For a report of this case, see 2 Eq. Rep. 300.]

1854.  
LORDS  
JUSTICES.  
Feb. 17.

## EXPARTE BAILEY, RE BARRELL. (a)

THIS was a petition presented by the trustees of the Barnstable and Chafford Benefit Building Society, by way of appeal from a decision of Mr. Commissioner *Goulburn*, refusing to allow payment in full out of the estate, of a sum of 777l. 14s. 9d. which at the time of the bankruptcy was due from the bankrupt, as treasurer to the society.

The duty of the treasurer was to receive the monthly sub-

LORDS  
JUSTICES.  
April 22. 28.  
A defaulting treasurer of a benefit building society having become bankrupt, the trustees of the society claimed to be paid in full out of the estate the moneys due

(a) Reported by H. C. Jones, Esq.

1854.

EXPARTE  
BAILEY,  
RE  
BARRELL.

*Statement.*

from him as  
such treasurer.

Whether  
this claim  
could have  
been sustained  
under 4 & 5  
Will. 4. c. 40.  
s. 12. and  
6 & 7 Will. 4.  
c. 32. s. 4.  
before the  
passing of the  
Bankrupt Law  
Consolidation  
Act, *quære.*

*Held*, that  
any preference  
given by those  
sections was  
taken away by  
the Bankrupt  
Law Consoli-  
dation Act,  
and that the  
case turned  
upon section  
167. of that  
Act.

*Held*, that  
this section  
does not apply  
to benefit  
building so-  
cieties, and  
that the society  
had no priority  
over other  
creditors.

scriptions when paid in, to pay them forthwith to the bankers of the society, and to exhibit the pass-book at regular intervals to the trustees. He had, however, retained considerable sums, and appropriated them to his own use, and it was stated that he had for a long time succeeded in imposing on the trustees by means of forged entries in the pass-book. When the trustees discovered that he was a defaulter, they obtained from him, shortly before his bankruptcy, a security for the balance due from him, but this security was decided to be void. (a) They then claimed to be paid in full under section 167. of the Bankruptcy Consolidation Act (b), but the Commissioner disallowed their claim. Against that decision the present appeal was brought.

Mr. *Swanston* and Mr. *T. Terrell* for the petitioners.

Mr. *Rolt* and Mr. *Bagley* (of the Common Law Bar), for the assignees.

On the fair construction of section 167. of the Bankruptcy Consolidation Act, this was not money in the hands of the bankrupt within the meaning of the Act. It was his duty to pay his receipts into the bank every month, and it was the duty of the trustees to see that he did so. When he retained them beyond the month he did not hold them by virtue of his office, but as a wrongdoer. The excess beyond a month's receipts was, in fact, money which he stole.

The Commissioner held the trustees guilty of negligence in not properly looking to the bankrupt's accounts as treasurer, and decided against them on that ground. They now say they did

(a) 1 Bank. and Insolv. Rep. 48.

(b) "That if any person already appointed, or who may hereafter be appointed to any office in a society established under the said recited Act or this Act, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his said office or employment, any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall die or become a bankrupt or insolvent, or have any execution, or attachment, or other process issued, or action or diligence raised against his lands, goods, chattels, or effects, or property or estate heritable or moveable, or make any assignment, disposition, assignation, or other conveyance thereof for the benefit of his creditors, his heirs, executors, administrators, or assigns, or other persons having legal right, or the sheriff or other officer executing such process, or the party using such

action or diligence, shall, within forty days after demand made in writing, by the order of any such society or committee thereof, or the major part of them assembled at any meeting thereof, deliver and pay over all moneys and other things belonging to such society to such person as such society or committee shall appoint, and shall pay out of the estates, assets, or effects, heritable or moveable, of such person, all sums of money remaining due which such person received by virtue of his said office or employment, before any other of his debts are paid or satisfied, or before the money directed to be levied by such process as aforesaid, or which may be recovered or recoverable under such diligence, is paid over to the party issuing such process or using such diligence, and all such assets, lands, goods, chattels, property, estates, and effects shall be bound to the payment and discharge thereof accordingly."



look to them, but were imposed upon by forged entries. They have suppressed that fact hitherto, if fact it be, and ought not to have any benefit from it now.

Again, the trustees took a security for this sum. That was a substitution of a new debt for the old claim; the money remained in the hands of the bankrupt as mortgagor, not as treasurer. [Lord Justice *Knight Bruce*. My difficulty as to that is, that the mortgage has been declared void. I think that otherwise your argument would be sound.]

But supposing the above grounds untenable, we rely on this: that building societies have not the privilege here claimed. The Bankrupt Law Consolidation Act, section 1. repeals all other Acts and parts of Acts which are inconsistent with it. The priority of payment which is here claimed was first given to friendly societies by 10 Geo. 4. c. 56. s. 20. That clause was repealed and re-enacted with variations by the Friendly Societies Act, 4 & 5 Will. 4. c. 40. s. 12. (a) That clause directs the assignees to pay the money in full. But by section 167. of the Bankruptcy Consolidation Act the assignees cannot pay — the Court is to do it. These two sections are inconsistent, therefore 4 & 5 Will. 4. c. 40. s. 12. is repealed. Now, the Act 6 & 7 Will. 4. c. 32. s. 4. (b) (the Building Societies Act) only extends to building societies certain provisions in the Friendly Societies Act; but those provisions having been repealed as to friendly societies, how can a building society take the benefit of

(a) "That all the provisions of a certain Act made and passed in the tenth year of the reign of his late Majesty King George the Fourth, intituled, 'An Act to consolidate and amend the Laws relating to Friendly Societies', and also the provisions of a certain other Act made and passed in the fourth and fifth years of the reign of his present Majesty King William 4., intituled 'An Act to amend an Act of the 10th Year of his late Majesty King George 4., to consolidate and amend the Laws relating to Friendly Societies,' so far as the same or any part thereof may be applicable to the purpose of any benefit building society, and to the framing, certifying, enrolling, and altering the rules thereof, shall extend and apply to such benefit building society and the rules thereof, in such and the same manner as if the provisions of the said Acts had been here-in expressly re-enacted."

(b) "That if any person already appointed or employed, or who may be hereafter appointed to or em-

ployed in any office in any society established under any of the Acts relating to friendly societies, and being entrusted with the keeping of the accounts, or having in his hands or possession, by virtue of his office or employment, any moneys or effects belonging to such society, or any deeds or securities relating to the same, shall have been or shall become bankrupt, the Court shall, upon application made by the order of any such society or any committee thereof, or the major part of them assembled at any meeting thereof, order payment and delivery over to be made to such society, or to such person as such society or committee may appoint, of all moneys and other things belonging to such society, and shall also order payment out of the estate and effects of the bankrupt of all sums of money remaining due which the bankrupt received by virtue of his said office or employment before any other of his debts are paid or satisfied."

1854.  
EX PARTE  
BAILEY,  
RE  
BARRELL.  
*Argument.*

1854.  
 EXPARTE  
 BAILEY,  
 RE  
 BARRELL.  
*Argument.*

them? The Building Societies Act, so far as relates to this matter is a mere accessory to the Friendly Societies' Act, and so far as the latter has been repealed, the former is repealed also.

Again, section 167. gives the benefit in question only to societies established under the Acts relating to friendly societies. This society was not established under those Acts, and considering the repealing clause in the Bankruptcy Act, the Court cannot give priority to any society not included in section 167.

But suppose that the Bankruptcy Consolidation Act had never passed, 6 & 7 Will. 4. c. 32. sect. 4. does not give building societies the privilege here claimed. The Building Societies Act incorporates the provisions of the Friendly Societies Act so far as is applicable "to the purpose of any benefit building society." Recovery of money from a defaulting treasurer cannot be held included in this expression. They referred to *Exparte Stamford Friendly Society* (a), *Exparte Ross* (b), and *Re Heanor Friendly Society*. (c)

Mr. *Swanston*, in reply, contended that the language of the Building Societies Act incorporated the Friendly Societies Act, so as to give building societies the same right of priority against the estate of a defaulting treasurer, and referred to *Giles v. Walker* (d), as showing the extent to which the one Act was incorporated in the other; that the Building Societies Act had incorporated certain provisions of the Friendly Societies Act in the same manner as if they were therein repeated; and that although those provisions might be repealed as regarded friendly societies, that would not prevent their remaining applicable to building societies. That these were clearly moneys in the hands of the bankrupt as treasurer. Even supposing that his giving a valid mortgage for them would have made them cease to be so, a void security must leave the rights of the mortgagees where they were before. But in fact a mortgage, even if valid, could not alter the nature of the debt. It was not as if the money had been originally lent to the bankrupt on security.

*Judgment.*  
*April 28.*

LORD JUSTICE KNIGHT BRUCE. As I view this case it is immaterial whether the entries in the pass-book, which are alleged to have been forged, were in reality forged or genuine; but I think it right to state that Mr. Commissioner *Goulburn* has informed us that he disposed of the matter without being aware that any forgery was alleged. I assume in favour of the

(a) 15 Ves. 280.  
 (b) 6 Ves. 802.

(c) 1 Beav. 508.  
 (d) 6 C. B. 662.

petitioners, but without deciding it, that if the Bankrupt Law Consolidation Act had not passed, they would have been entitled to what they claim; but I think that the objection founded on that statute is fatal to their demand, unless they can bring themselves within the 167th section. I think that they do not come within that section, and that by this Act the Legislature has cut them off from the benefit to which, on the assumption I have made, they would have been entitled under the earlier statutes. I am of opinion, therefore, that the case of the petitioners fails, and that the petition must be dismissed with costs.

**LORD JUSTICE TURNER.** The petitioners, as trustees of a building society, pray to be paid out of the estate of the bankrupt the full amount of the moneys due from him as treasurer of the society. Their case rests, firstly, on section 167. of the Bankrupt Law Consolidation Act. [His Lordship read the section.] It was in the next place argued for them that if they are not entitled under that section, they are so under the combined effect of 4 & 5 Will. 4. c. 40. s. 12., and 6 & 7 Will. 4. c. 32. s. 4. [His Lordship read those sections.] I am of opinion, that the petitioners are not, under any of these enactments, entitled to the relief sought by this petition. The 167th section of the Bankrupt Law Consolidation Act is in terms confined to societies established under the Acts relating to friendly societies. This society was not established under either of those Acts, but under the Act relating to building societies. The Legislature must be supposed to have had both classes of societies in view; it has expressly confined the benefit of the 167th section to friendly societies, and the Courts have no power to extend that benefit to other societies. The Consolidation Act expressly repeals all Acts and parts of Acts which are inconsistent with its provisions, and appropriates the bankrupt's estate for the benefit of the creditors who are entitled under that Act. It would be inconsistent with that Act to give payment in full to any creditor to whom such a benefit is not given by the Act itself. I am of opinion, therefore, that any priority to which the petitioners might have been entitled under the earlier enactments is taken away by the Consolidation Act.

The Commissioner has disposed of the case on other grounds, as to which I do not think it necessary to express any opinion. The petitioners have come here seeking for a preference, to which, in my opinion, they are not entitled, and I agree that the petition ought to be dismissed with costs.

*Solicitors, J. & J. H. Linklater; Lawrance, Flews, & Boyer.*

1854.  
EXPARTE  
BAILEY,  
RE  
BARRELL.  
*Judgment.*

1854.

COURT OF  
BANKRUPTCY.March 13.  
Judgment.

Previous to the adjudication, W. proceeded against T. for the recovery of a debt both at Law and in Bankruptcy by trader debtor summons, simultaneously, and was requested by T. to withdraw the proceedings in Bankruptcy, T. promising to give security for payment of the debt out of the surplus which he expected would come to him out of certain property belonging to him, which he had mortgaged, and which was about to be sold. Arrangements were made for carrying this proposition into effect, but before they could be concluded, the time for paying and compounding under the 12 & 13 Vict. c. 106. s. 80. had elapsed, and T. filed a declaration of insolvency (12 & 13 Vict. c. 106. s. 70.), on which he was adjudicated a bankrupt. W. claimed a lien on the mortgaged property in respect of the agreement. *Held*, that W. had notice that T. had committed an act of bankruptcy in respect of the trader debtor summons, and that the lien could not be sustained.

## EXPARTE WESTON, IN RE TAYLOR. (a)

Before MR. COMMISSIONER FANE.

THE facts of this case will fully appear from the judgment.

MR. COMMISSIONER FANE. The question in this case was, whether Weston had acquired an equitable lien on certain property of the bankrupt as a security for 75*l.* and interest, before the bankrupt had committed an act of bankruptcy, of which Weston had notice. The facts are these: Before September 1853 the bankrupt had mortgaged the property in question, and the deeds relating to it were in the hands of Lethbridge and Company, the mortgagee's solicitors. About the 13th of September Weston proceeded against the bankrupt to recover the 75*l.* and interest by issuing a summons in Bankruptcy (b) and a Common Law writ coterminously. The bankrupt immediately communicated with Weston, and in writing offered that, if Weston would withdraw the proceedings in Bankruptcy, he would give him an order on the mortgagee and his solicitors to pay the debt, &c. out of an expected surplus to come from the sale of the mortgaged premises. Weston states that he only was requested to withdraw the summons, and the bankrupt did not object to his going on at Law. This proposal by the bankrupt led to some verbal communications, the result of which, however, it is difficult to make out. All that is certain is, that the proceedings in bankruptcy were not withdrawn, and that the bankrupt did, in compliance with the Bankrupt Law Consolidation Act (c), appear and file an admission of the debt on the 20th September, and that he did not pay or offer to pay the debt, or secure or compound for it to the satisfaction of Weston within seven days after; and that, therefore, he committed an act of bankruptcy on the 28th of September (d), of which Weston, of course, had notice.

But though Taylor had been compelled, by the non-withdrawal of the summons on the 20th, to sign and file an admission of the debt, the negotiation continued.

On the 24th September Mr. Place, the bankrupt's solicitor, wrote to Messrs. Newbon and Company, Weston's solicitors, promising to communicate with them on the Monday following,

(a) Reported by J. W. M. Fonblanque, Esq.

(b) 12 & 13 Vict. c. 106. s. 78. *et seq.*

(c) 12 & 13 Vict. c. 106. s. 81.

(d) *Ibid.* s. 80.

and several interviews took place between the solicitors, which resulted in an arrangement that Mr. Place should prepare a draft agreement, whereby Taylor should "agree to" execute a mortgage on the already mortgaged property; and, further, that the father and uncle of the bankrupt should release any claims they might have on it. On the 29th Mr. Place sent to Messrs. Newbon a draft agreement, and enclosed a letter of waiver from Taylor's father, to which Messrs. Newbon replied by letter of the 30th, approving the draft agreement, and the father's letter, but insisting on a similar one from the uncle. After this nothing further was done, except that Messrs. Newbon pressed more than once for an immediate settlement, and on the 24th October wrote to Mr. Place to say that, unless the arrangement was carried out in the course of the next day they should proceed. On the 4th of November the bankrupt was gazetted.

Under these circumstances it is clear that Mr. Weston did not acquire any lien upon the property before the bankrupt had committed the act of bankruptcy on the 28th of September, of which Weston had notice. There may have been a willingness to give, and a willingness to receive security, before the 28th, but no final arrangement was made; and, therefore, no lien was created. It was treaty, not agreement. If Mr. Weston consented to anything before the 28th, it was to receive a security, supported by a waiver on the part of the uncle. That waiver was never obtained by the bankrupt; and, therefore, no final agreement ever existed between Weston and the bankrupt. Weston, therefore, has no priority over the ordinary creditors.

Solicitors, *Stedman & Place; Reed, Langford, & Marsden.*

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EXPARTE  
WESTON,  
IN RE  
TAYLOR.  
*Judgment.*

## EXPARTE LANGTON, IN RE CLARKSON. (a)

Before MR. COMMISSIONER FANE.

COURT OF  
BANKRUPTCY.  
March 31.

THIS was an application by the assignees of Abraham Clarkson, a bankrupt, for an order under the 125th section of the 12 & 13 Vict. c. 106. to sell the various articles hereinafter enumerated as "goods and chattels" in the possession and reputed ownership of the bankrupt at the time of his bankruptcy. The right of the assignees to sell the articles in question was

(a) Reported by J. W. M. Fonblanque, Esq.

utensils, implements, and things on or about the premises. Proviso for redemption on payment of the mortgage debt on a day certain, or at such earlier day as the mortgagee should appoint; and that until default, the mortgagor should retain possession of the premises, &c. The mortgagor remained in possession of the premises, &c. up to his bankruptcy. Held (on submission to the jurisdiction) that certain plant and fixtures enumerated below of a moveable nature passed to the assignees.

Mortgage for a term of years of a brewery, tap, malt lofts, and premises, together with plant, fixtures, and machinery, and assignment to mortgagee of plant, goods,

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*Statement.*

disputed by Mr. Langton, who claimed those articles as the true owner, but who appeared, and submitted to the jurisdiction of the Court. (a)

Mr. Langton's title to the articles hereinafter described was founded upon an indenture dated the 22nd May 1852, by which Abraham Clarkson, in consideration of 300*l.* then advanced to him by Langton, demised to Langton the brewery, tap, malt lofts, and premises, known as the Berkshire Brewery, together with the plant, fixtures, and machinery thereunto belonging, for the residue of a term of twenty-one years (less ten days); and by the said indenture Clarkson assigned to Langton the plant, goods, and utensils, implements and things, which were in, about, or belonging to the said brewery, tap, malt loft, and premises, subject to a proviso for avoidance of the said indenture on payment by Clarkson to Langton of 300*l.* on the 22nd May 1854, or at such earlier day as Langton should appoint for payment thereof by notice in writing, and on payment in the meantime of interest thereon at 5*l.* per cent. per annum, on the 22nd May and the 22nd November in any year. The indenture provided that until default in payment of the principal and interest, and notice given according to the stipulation contained in the deed, Clarkson should continue to hold possession of the premises, plant, goods, utensils, and implements comprised in the security.

It was admitted that the goods and chattels in question passed to Mr. Langton under the last-mentioned indenture; that Clarkson became bankrupt on the 15th day of June 1853; that at that time no notice to pay principal or interest had been served upon him by Langton, and no part of the principal or interest reserved by the deed had been paid; and that all the articles hereinafter enumerated were in the use and occupation of the bankrupt at the time of his bankruptcy for the purposes of his business as a publican and brewer.

The assignees contended that all the articles hereinafter enumerated (b) were "goods and chattels" "in the possession, order, or disposition of the bankrupt at the time of his bankruptcy," with the consent and permission of the true owner.

(a) 12 & 13 Vict. c. 106. s. 12.

(b) List of articles in question, with description of the manner in which they were fixed (if fixed at all) to the premises:—

Abandoned by	}	1. Casks, barrels, vats, and	}	Not attached.
claimant		butts -		
	}	2. Deal dresser with two	}	Attached to the wall by
		shelves, inclosed cupboard underneath		
Abandoned by	}	3. Eleven spirit bottles in	}	Not attached.
claimant		the bar		

Mr. Langton submitted, firstly, that these were not goods and chattels within the meaning of the 125th section of the 12 & 13 Vict. c. 106.; secondly, that these were not goods and chattels, in the disposition and order of the bankrupt at the time of his bankruptcy, within the meaning of that section.

Mr. T. J. Clark, for the claimant, relied upon the following authorities: *Exparte Reynell* (a), *Exparte Bentley* (b), *Exparte Tagart* (c), *Hall v. Baker* (d), *Exparte Braidwood* (e), *Fenn v. Bittleston* (f), *Hubbard v. Bagshawe* (g), *Exparte Watkins* (h) *Exparte Cotton* (i), *Exparte Lloyd*. (k)

Mr. Bagley, for the assignees, relied upon *Hellawell v. Eastwood* (l), *Exparte Humphreys, Re Gibbs* (m), *Exparte Sparrow*. (n)

MR. COMMISSIONER FANE. I think that the above goods, including those fastened by screws, &c., to the freehold, were goods and chattels within the meaning of the Bankrupt Law Consolidation Act, 1849, section 125., and passed to the assignees; and I so decide upon the authority of *Hellawell v. Eastwood*, *Exparte Humphreys, Re Gibbs*, and *Re Wood*, decided by Mr. Commissioner Fonblanque, in 1852; a full note of whose judgment will be found in 1 *Bankruptcy and Insolvency Reports*. (o)

Solicitors, *Preston; Meiklem*.

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Abandoned by claimant	4. Four spirit casks with pipes and taps	-	Not attached.
	5. A six pull beer engine, with pipes, &c.	-	Nailed to the floor; an opening for the pipe to communicate with the vat in the cellar.
	6. Spirit shelving	-	Fastened to the wall as shelves usually are.
	7. Seat	-	Fixed to the wall and floor.
	8. Pipe-box	-	Nailed to the wall.
	9. Shelving in the bar	-	Fastened to the wall as shelves usually are.
	10. Mahogany counter in bar	-	Nailed to the floor.
	11. Gas-fittings	-	Fixed as usual.
	12. Square complete	-	Screwed to timbers.
	13. Refrigerator in the brewery	-	Fixed to the cooler by bolts and screws.
	14. Desk as fitted in counting-house	-	Fixed to the wall by hold-fasts and nails.
	15. Stool ruler	-	Not attached.
	16. Book-shelves	-	Nailed to the wall.

(a) 2 M. D. & De G. 443.

(b) Ibid. 593.

(c) 1 De G. 533.

(d) 9 East. 215.

(e) 1 M. D. & De G. 631.

(f) 7 Exch. 152.

(g) 4 Sim. 326.

(h) 1 Dea. 296.

(i) 2 Mont. D. & D. 725.

(k) 3 Dea. & Chitty, 765.

(l) 6 Exch. 295.

(m) 1 Bank. & Insolv. Rep. 68.

(n) 2 De G. M. & G. 907.

(o) P. 70. n. (f).

1854.

COURT OF  
BANKRUPTCY.

May 8.

H., by deed, assigned all his shop and dwelling-house, stock-in-trade, &c., and property at W. or elsewhere, in consideration of an old debt and a present advance, subject to a proviso for redemption. The mortgagee ultimately took possession, and proceeded to sell. A few days before possession was taken, H. departed from his house, but left his address behind, and promised to return on a certain day. He did return for a few hours, but disappointed a creditor he had promised to pay. *Held*, that the deed and departure were both acts of bankruptcy.

## IN RE HOLLOWAY. (a)

Before MR. COMMISSIONER GOULBURN.

**THIS** was an application by William Holloway, the bankrupt, to set aside an adjudication against him dated the 4th of April 1854. The facts stated below appear on the examination of the bankrupt by the Court, and of several witnesses, which examinations are reduced into writing and filed with the proceedings, and from the indenture referred to below, a copy of which is filed with the proceedings.

The bankrupt was a trader dealing in coals and corn, and possessed a shop and dwelling-house in the town of Watford, thoroughly fitted up and furnished for the purposes of business and occupation. On the 14th of Dec. 1853, he conveyed by deed to his brother, Henry Holloway, for the considerations therein expressed, viz. partly a bygone debt for money lent (390*l.*), and partly a further immediate advance (55*l.*), "all that his household furniture, plate, linen, china, books, horses, carts, carriages, harness, implements of trade, fixtures, and all other the goods, chattels, and effects of him the said William Holloway, being in, upon, or about the messuage or dwelling-house, warehouses, yards, buildings, and premises of him, the said William Holloway, situate at Watford aforesaid or elsewhere," *habendum*, to William Holloway and his assigns for ever, subject to a proviso for redemption within a period which had elapsed previous to a sale mentioned below, and contingent upon an event which has not occurred.

Beyond the property so conveyed and subsequently sold, the bankrupt appeared to possess no property or effects with which he could continue to carry on his business, although he stated that he was entitled to a reversion of a small copyhold estate valued at about 400*l.*, and that he was possessed of certain shares in a brewery company, of some value, and certain book debts, amounting to 200*l.* or 300*l.*, assumed by him not to be comprised in the terms of the indenture of December as "goods, &c." at "Watford, or elsewhere." Possession under the deed was taken by Henry Holloway, on the 13th of March, of the dwelling-house and shop, and everything therein, with the knowledge and concurrence of the bankrupt, who was made aware of his brother's intention some days before, and thereupon made arrangements to close his trading business, and remove himself and family; and accordingly he and his wife departed

(a) Reported by J. W. M. Fonblanque, Esq.



from their dwelling-house on Monday the 12th of March, having discharged the servant, and leaving an aged female (the bankrupt's aunt) to take care of two of his young children till he could find a place to remove them to, and leaving with her a card stating truly his address in London; he also stated truly to his aunt his purpose of returning to Watford on the Wednesday following, which he did for a few hours, after which he returned to London, where he continued to reside. The shop remained closed by the direction of Henry Holloway from the time that possession was taken. On the same day, an auctioneer, by Henry Holloway's instructions, posted bills about the neighbourhood to announce the sale of the premises and effects thereon, which was to take place on the 20th then instant, on which day the premises, and all the goods thereon, were sold, with some very trifling exceptions.

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On the 13th, three of the bankrupt's creditors called at his dwelling-house, requesting payment of their several debts. They were told by the aunt where the bankrupt was, and that he would be in Watford again on the 15th, on which day one of such creditors called again, and saw him, but was not paid. Another of the creditors called for his debt by an appointment made by the bankrupt, with a promise to pay, but did not meet the bankrupt; and his debt still remains unpaid.

Mr. *Lucas*, for the petitioning creditor, contended that there were two separate acts of bankruptcy proved against William Holloway, viz., the deed of December and the departure from Watford in March: *Lindon v. Sharpe* (a), *Smith v. Cannan* (b), *Graham v. Chapman*. (c)

Mr. *Bagley* showed cause against the adjudication. The act of bankruptcy on which the adjudication proceeded was, the trader's absenting himself from his dwelling-house on Sunday the 12th March. The absenting was an equivocal act; and the evidence clearly proved that it was not done with an intention to defeat or delay creditors. The alleged bankrupt left his true address at his dwelling-house, legibly written on cards, to be given to all persons inquiring; and he stated that he should return home on Wednesday. He did return at the time specified, himself opened the door to a creditor calling, and saw every person desirous of seeing him, whether a creditor or not. Such a course of proceeding negatived the inference that the bankrupt left his home to avoid his creditors. The mortgage bill of sale executed in the middle of January, and agreed to be exc-

Argument.

(a) 7 Scott, N. R. 745.

(c) 12 Com. B. 85.

(b) 1 Com. L. Rep. 179.

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 {  
 IN RE  
 HOLLOWAY.  
*Argument.*

cuted in the month of December, was not an act of bankruptcy. It did not convey the alleged bankrupt's book debts, his copyhold property, or any shares that he possessed in public companies. It was a conveyance of a part of his property, made by a man who was not then insolvent, and did not contemplate bankruptcy. There was convincing evidence that neither the alleged bankrupt nor his brother, Henry Holloway, contemplated bankruptcy in the middle of December, when instructions were given to prepare the bill of sale, for it appeared that on the 26th December the alleged bankrupt drew on his brother for a further sum of 100*l.*, which the latter paid, without including it in the bill of sale, or taking any security for it. Lord *Kenyon* said, in *Whitwell v. Thompson* (a), "It never can be taken to be law, that a trader, when embarrassed, may not assign his property to a person who will assist him in his difficulties as security for any advances such person may make." If this proposition is not recognized to the full extent, it must, at all events, be admitted when, as here, the trader only assigns a *part* of his property. In all the cases cited, the trader assigned the whole, or what must be considered as substantially the whole, of his property. In the present case it was clear, from the evidence, that there was a substantial surplus, which did not pass by the deed; and, for anything that appeared when the deed was agreed to be executed, the alleged bankrupt might have had enough to pay every creditor twenty shillings in the pound. In all the cases cited, the Court had satisfactory evidence of the state of the trader's affairs when the act of bankruptcy took place. The petitioning creditor was bound to supply such evidence. In *Wedge v. Newlyn* (b) it was held that those who rely upon a conveyance of a trader's effects as constituting an act of bankruptcy, must show that it was calculated to have the effect of preventing him from continuing his business, and rendering him insolvent, by evidence of the general state of the party's affairs at the time of such conveyance. Here, although there was some evidence that the trader relinquished his business in March 1854, there was nothing to show the state of his affairs in December 1853, when the money was advanced by his brother, and the deed agreed to be executed. It is not enough to show that when the deed was acted upon the trader discontinued his business. The true question is, what was the state of his affairs when the deed was agreed to be executed? and in the present state of the law, the petitioning

(a) 1 Esp. 68.

(b) 4 B. & Ad. 831.

creditor might have examined the alleged bankrupt, and ascertained his circumstances.

*The Commissioner.* Why has not the bankrupt been examined?

1854.  
IN RE  
HOLLOWAY.  
*Argument.*

*Mr. Lucas.* It has never been the practice to examine a bankrupt to prove his own act of bankruptcy; and it has been doubted whether it can be legally done, as bankruptcy is in some sense a criminal proceeding.

*Mr. Bagley.* In the matter of *Dufour*(a), which was an appeal against an adjudication, the *Lords Justices* examined the alleged bankrupt, and reversed the adjudication; and in this Court, in the matter of *Kirk*, arising out of the Islington Cattle Market Company, the *Commissioner* himself examined the bankrupt when the counsel declined so to do.

*The Commissioner.* I shall pursue that course in the present instance, and examine the alleged bankrupt.

William Holloway was then sworn and examined by the *Commissioner* touching the state of his affairs in the middle of January 1854; and the *Commissioner*, at the conclusion, intimated that the impression the examination left on his mind was, that the trader believed himself to be solvent when he executed the deed.

*Mr. Lucas* (for the petitioning creditor), asked that the case might be adjourned to allow evidence to be adduced to show that the trader was not solvent in January 1854. The alleged bankrupt's evidence on that point had taken him by surprise, and, he was instructed, could be contradicted.

*The Court* adjourned the sitting, to allow fresh evidence to be adduced on that point; but afterwards intimated that he considered any further evidence unnecessary.

**MR. COMMISSIONER GOULBURN.** It appears to me, from the evidence, that the shop was shut up and left by Mr. Holloway, in pursuance of a previously fixed intention, for, looking at the deed of December, it is impossible for me to avoid the conclusion that William Holloway, in assigning his trade, premises, and stock, and at the very least the largest part of his available property, contemplated the discontinuance of his trade; at any rate, he must have been aware that the inevitable result of such an assignment must be, that the trade could not possibly be carried on; such a deed has been always held to be an act of bankruptcy, as I have recently been called upon to decide(b);

*Judgment.*

(a) 21 L. J. 38. Bankr.

(b) *Suprà*, p. 127.

1854.  
 IN RE  
 HOLLOWAY.  
*Judgment.*

and it is now only necessary for me to refer to the case of *Bailey v. Barrell* (a) to support that view.

But this case goes beyond the question of the deed, for as soon as that instrument was to be put in operation, William Holloway departed from his home. It has been urged at the bar, that the fact of his leaving his address behind prevents this departure from being an act of bankruptcy; but I do not think that any argument on a single circumstance like that can take away an established conclusion at law. The fact seems to me that the departure was the intention of delaying creditors, and it is proved that one creditor was actually delayed when William Holloway failed in his appointment. I am, therefore, of opinion that there have been two sufficient acts of bankruptcy, and that the adjudication must be confirmed.

Solicitors: *Thompson, Debenham, & Brown; Crossley & Burn.*

(a) 1 Bank. & Insolv. Rep. 48.

COURT FOR  
 RELIEF  
 OF INSOLVENT  
 DEBTORS.  
*April 10.*

Where there has been a contest before a jury, and a motion afterwards to the Court on a legal point, the Court is disinclined to pronounce a defence vexatious; but where the plaintiff, by such defence, has been put to a considerable expense, and it appears that the plea was founded in falsehood, the Court will adjudge the defence vexatious.

*Judgment.*

## RE STEPHEN COUCHMAN. (b)

Before the CHIEF COMMISSIONER.

THE facts of the case will sufficiently appear from the judgment.

THE CHIEF COMMISSIONER. I might have adjudicated here on my first impression of the case; but where there has been a contest before a jury, and a motion afterwards to the Court on a legal point, the Court is disinclined to pronounce a defence vexatious. On consideration, I think that the defence, which has caused to the plaintiff an enormous expense, was vexatious, because it was founded in falsehood. The learned Serjeant who tried the case gave leave to move upon a point which did not touch the real merits of the defence. It arose on a point of evidence, and grew out of a fact which really had no importance, and which was quite unknown to the defendant when he pleaded to the action. The ground of defence was one, in regard to which the insolvent deceived his own solicitor, who accordingly pleaded that the defendant understood and believed that Golden, the agent, was the owner of the goods he sold to the insolvent, and that he sold them as his own. That was not true; the insolvent was brought to confess, at the trial, that he knew Golden sold as factor, and not on his own account; and

(b) Reported by E. H. Reed, Esq.

I further believe the evidence of Morgan, when he tells us what passed at the warehouse upon his meeting the insolvent there, and which shows that he knew Morgan to be the owner of the goods. At that time, in Morgan's presence, he declined to be a purchaser; but soon after he did buy those goods from Golden, the factor, for the sum of 100*l*. It has never been pretended, either on the trial or here, that they were ever specifically paid for, but only that, in other dealings between the insolvent and Golden, Golden was the debtor on a balance of accounts. If there were satisfactory proof of this, which there is not, it would not avail. Much of the debt suggested as owing from Golden, was prior to the purchase of Morgan's goods, and the whole of it is either for goods sold at Golden's retail shop, in another place, or sold by him on insolvent's account. When he was asked by the insolvent to make out and give him his account, he delivered an account of the transactions between them, not bringing in Morgan's goods. If the balance there was in favour of the insolvent, he could not treat it as payment for Morgan's cheeses. The whole expense of these law proceedings has been caused by the false plea that Golden sold on his own account, a statement which was known to be untrue. The insolvent had been for many years an uncertificated bankrupt, and, as far as I can see, would better have continued so; for, on getting his certificate, he incurred new debts, and in a very few months was deeply involved again, for the third time. He will be discharged at the expiration of eight calendar months, from the date of the vesting order, for having vexatiously defended the action which had been brought against him.

Attorney: *Spiller*.

## RE TIMOTHY STAFFORD. (a)

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, who described himself as a dealer in clocks and watches, applied for his discharge under 1 & 2 Vict. c. 110.

Mr. *Reed* opposed on behalf of the detaining creditor, a Mr. M'Lean, to whom the insolvent alleged a debt of 22*l*., for money lent.

(a) Reported by E. H. Reed, Esq.

(b) Mr. Commissioner *Murphy* adopts the same practice and dismisses a petition where the arrest is friendly, and there are no assets for creditors; but the Chief Commissioner rarely dismisses a petition on this ground where the schedule shows a case of real pecuniary difficulty.

1854.

RE STEPHEN  
COUCHMAN.

*Judgment.*

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 6.

Where the arrest is friendly, and there are no assets to be divided amongst creditors, the petition will be dismissed.

1854.

RE TIMOTHY  
STAFFORD.*Argument.*

Mr. *Sargood* appeared on behalf of other creditors.

On the 23rd of March, in the present year, the insolvent had given a warrant of attorney to his detaining creditor, upon which he was arrested, four days afterwards, in Whitecross Street, to which place he had driven in a cab, but for what purpose he was unable to explain. He swore, however, he had no idea of being arrested. It was proved the same solicitor who attested the execution of the warrant of attorney to Mr. M'Lean, now acted on behalf of the insolvent.

Mr. *Sargood* asked the dismissal of the petition. The arrest was clearly friendly, and there were no assets for creditors.

*Judgment.*

MR. COMMISSIONER PHILLIPS said, the case was one of profligate concoction, attended with a determined attempt to deceive the Court. There could be no doubt the arrest was friendly, and as the insolvent brought no assets into Court, the petition would be dismissed.

Attorney: *Hare*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 11.

Where an insolvent willfully omits a debt from his schedule, the Court will dismiss the petition, although the creditor omitted does not desire to oppose.

## RE THOMAS PAIN. (a)

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, who described himself as the keeper of a post-office at Ham Common, Surrey, appeared, on his interim order for protection. He had petitioned the Court in March last, when his petition was dismissed on account of an omission in his description. The present petition was opposed by Mr. *Swinburn*, on behalf of insolvent's landlord, who required possession of some premises which it was arranged should be given to him in a week. Another creditor opposed in person, but he failed to make a case against the insolvent.

In the former and present petition the insolvency was partly attributed to having been obliged to pay to the Rev. Mr. Hough a sum of 45*l.* twice over, which the insolvent explained by stating he had handed that sum to a servant of the reverend gentleman in his absence; but he, not receiving it, had compelled the amount to be paid a second time.

Mr. Hough now appeared, and stated the insolvent had been his collector in 1849, and in that capacity he had received for him various sums, amounting to 45*l.* From that period to

February 1854 he had paid over 36*l.* 17*s.*, leaving a balance due of 8*l.* 3*s.*, which was entirely omitted from the schedule. In 1852, he had alleged a payment of the 45*l.*, first to witness's wife, then to witness's mother, then to his sister, afterwards to his nurse, and finally to a female servant; but he had declined to confront either. The result was, he had been told that unless the money was paid, the matter would be placed in the hands of an attorney. The insolvent then agreed to pay.

In reply to the Court, the insolvent declared that if anything remained due on this account, it was but a trifle. He afterwards swore the whole sum was paid. He denied he had told Mr. Hough the money had been paid to his wife, but he admitted he might have said it was paid to his mother, his sister, and his servant. Mr. Hough said he did not wish to oppose the insolvent; he only desired to refute the statement made respecting himself.

MR. COMMISSIONER PHILLIPS said, he did not remember a more dishonest case. The insolvent had received a warning under his former petition, wherein he originated the calumny repeated to day, that a gentleman in the sacred profession had exacted double payment of a debt from him. The reverend gentleman, however, felt his character involved by such a statement, and had attended for the single purpose of refuting it. Mr. Hough, notwithstanding the calumny cast upon him, did not desire to oppose. The Court, however, was bound to notice the evidence before it. The insolvent had sworn his schedule contained a true account of all his debts; yet that due to Mr. Hough was entirely omitted. It was impossible to suppose the insolvent had forgotten it, because all the circumstances connected with it must have brought the debt vividly to his recollection, when he made the statement in his schedule which brought Mr. Hough to the Court. The debt had been wilfully omitted; and under such circumstances, he should dismiss the petition.

Attorney: *George.*

## RE GEORGE MATTHIAS JAQUES. (a)

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, a petitioner for protection, appeared on his interim order. He had described himself as George Matthias Jaques, otherwise George Matthias Jacobs. He admitted, on

(a) Reported by E. H. Reed, Esq.

1854.  
RE THOMAS  
PAIN.  
*Argument.*

*Judgment.*

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
May 11.

Where an insolvent petitions the Court in a fictitious name, giving his real name as an *alias*, his petition will be dismissed.

1854.

RE GEORGE  
MATTHIAS  
JAQUES.

*Statement.*

examination, his real name was Jacobs; but finding it objectionable in business, on account of its Jewish signification, he had for many years adopted the name of Jaques, and in that name he had contracted the whole of the debts in his schedule. It appeared, however, that in 1846 he had been declared a bankrupt; and his certificate described him as George Matthias Jacobs.

*Argument.*

Mr. *Sargood* submitted the petition must be dismissed. An insolvent was bound to describe himself correctly, although he had traded in a fictitious name. It was of the greatest importance, as it affected his title to property.

*Judgment.*

MR. COMMISSIONER PHILLIPS said, he was afraid there was no getting over the objection; the insolvent should have petitioned in his real name, giving the assumed name under an alias. The petition must be dismissed.

Attorney, *Wells*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 17.

Where an insolvent petitions the Court under the protection statutes, and no final order is granted, the Court will not permit him to insert the debts in a subsequent petition under the prison statutes.

RE WILLIAM ALEXANDER HOLMES. (a)

Before THE CHIEF COMMISSIONER.

THE insolvent, a clerk in the Ordnance Office, applied to be discharged on bail under 1 & 2 Vict. c. 110. He had petitioned the Court under the protection statutes, in May 1851. At the period of his petition he was in receipt of 160*l*. annually, and he was ordered to set aside 60*l*. annually for the gradual liquidation of his debts. He had made two payments of 15*l*. each, but being unable to make a third, he was without protection. Having contracted fresh debts, and being in custody, he had petitioned the Court under 1 & 2 Vict. c. 110., inserting in his schedule the debts due at the date of his former petition.

*Judgment.*

THE CHIEF COMMISSIONER. This party is at this moment in the course of a payment under a particular Act. At the period of his former petition he was in receipt of a salary of 160*l*. annually, and he was ordered to make a periodical payment of 60*l*. for the general benefit of creditors. He has made two payments, but having failed in making the third, he is without protection. He cannot alter the course of law and make new laws for himself; if he wished the payments to be



reduced or to be got rid of altogether, he knew how to ask for it. He cannot change the Acts and say, Give me now under the 1 & 2 Vict. c. 110. that which I could not get under the protection statutes. There is a petition pending; he cannot desert it and say, Give me a discharge under a new petition. It has been the principle here, ever since the two Acts came into operation, that a man cannot insert the same debts in two petitions, and from that principle I never mean to depart. The petition is dismissed.

THE CHIEF COMMISSIONER subsequently said, The great defect in the Protection Act is, that it leaves the payment of the instalments to an insolvent's pleasure, and it frequently becomes difficult or inconvenient to him to make the payments as they become due; the result is, they are not paid, and the insolvent forfeits his protection; whereas, under the prison statutes, the payment is made direct to the assignee by the heads of the office to which the insolvent belongs, and is not left to his pleasure or convenience.

Attorney: *Bussell*.

1854.  
RE WILLIAM  
ALEXANDER  
HOLMES.  
Judgment.

### RE ARTHUR BLYTH. (a)

Before MR. COMMISSIONER MURPHY.

**MR. REED** moved to dismiss the insolvent's petition. The affidavit stated that, in October 1852, he had petitioned the Court under the protection statutes, when he was opposed by several creditors, and his case adjourned *sine die*. He had since discharged the debts of his opposing creditors, and reduced the claims of others, but having contracted fresh debts, he was now in prison.

**MR. COMMISSIONER MURPHY.** I suppose you desire to insert in the petition the insolvent is about to file, the debts owing at the date of his former application, but how can I mix these two cases up together? The creditors of 1852 are, surely, entitled to the insolvent's estate before the creditors of 1854; then why should I destroy the assignee's title? I decline to dismiss the petition; the cases must be kept apart, and the insolvent, as to the old debts, may apply under the 28th section.

Attorney: *Hope*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 17.

B., whose petition, under the Protection Act had been adjourned *sine die*, contracted fresh debts, and was arrested in consequence. Held, that he was not entitled to insert in his new petition, under 1 & 2 Vict. c. 110., the debts he had scheduled under his former application.

(a) Reported by E. H. Reed, Esq.

1854.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 17.

Where an insolvent omits to file his books, the Court will refuse a discharge on bail, under sect. 38. 1 & 2 Vict. c. 110.

Judgment.

## RE JOSEPH PARRY. (a)

Before THE CHIEF COMMISSIONER.

THE insolvent, a petitioner under 1 & 2 Vict. c. 110., applied to be discharged on bail until the day of hearing. He had omitted to file his books, which he stated were in the hands of some friends, to whom he had made an assignment of his property shortly before petitioning the Court.

THE CHIEF COMMISSIONER. The insolvent has neglected to file his books, and I have no power to discharge him from custody. He was sued on the 8th of April, and delays his creditors by putting in a plea. He then makes an assignment to friends, and places his books in their custody. A few days afterwards he petitions this Court, and then he says, "Because I thought proper to make an assignment, I shall dispense with what the law requires, and not file my books. This is not sufficient, and I shall not discharge him."

Attorney: *Hodson*.

(a) Reported by E. H. Reed, Esq.

LORDS  
JUSTICES.

April 22.

A. brought an action against B. for the balance of an account current. A verdict was taken by consent for 100,000*l.*, subject to a reference to an arbitrator, who was to have power to cause a verdict to be entered for either party. After six years the arbitrator made an award in A.'s favour for 11,000*l.*

Four days after the award was made, and before judgment had been signed and costs taxed, B. committed an act of bankruptcy, and gave notice of it to A. A. caused judgment to be entered up. B. was adjudged bankrupt, and A. claimed to prove for the sum awarded, with interest and costs.

Held (affirming the decision of the Commissioner, *suprà*, 201.), that A. was entitled to prove for the debt, interest, and costs, as a liquidated sum, though judgment had not been signed until after notice of the act of bankruptcy; for that the award must not only be referred to and considered as standing in place of the verdict, but as something more, and therefore as establishing a proveable debt, until it was shown that it could be set aside at law.

## HARDING, APPELLANT.

EXPARTE THORNTHWAIT, IN RE PICKERING. (b)

THIS was an appeal by the creditors' assignee of the bankrupt against the decision of Mr. Commissioner *Holroyd*, reported *suprà*, 201., where the facts of the case sufficiently appear.

Mr. *Swanston* and Mr. *Willes* (of the Common Law Bar), for the appellant, argued the case on the same grounds as were taken before the Commissioner; and referred to *Exparte Bryant* (c), *Smith's Merc. Law* (d), *Exparte Butterfill* (e), *Exparte Kemshead* (f), *Exparte Mudie* (g), *Exparte Moody* (h), *Cottam v. Partridge*. (i)

(b) Reported by H. C. Jones, Esq.

(c) 1 Ves. &amp; B. 211.

(d) P. 589. 3rd edit., 573. 4th edit.

(e) 1 Rose, 192.

(f) Ibid. 149.

(g) 3 M. D. &amp; De G. 66.

(h) 2 Rose, 413.

(i) 2 M. &amp; G. 843.

Mr. Rolt, Mr. Hoggins (of the Common Law Bar), and Mr. Hardy, for the respondents, were not called upon.

1854.  
HARDING,  
APPELLANT.  
IN RE  
PICKERING.  
*Judgment.*

THE LORD JUSTICE KNIGHT BRUCE. Mr. Thornthwaite, claiming to be a creditor of Mr. Pickering, brought an action against him in 1845; the action was defended, and was brought to trial only in 1847, and was referred to arbitration, and the arbitration was pending until early in the year 1853. Mr. Pickering, having found that the award was made against him, resorted to the expedient of filing a declaration of insolvency; no doubt with the object of preventing his creditor, delayed as he had been from 1845 to 1853, from obtaining the fruit of the award. The present proceeding is on the part, not of Mr. Pickering, it is true, but on the part of one of his assignees; but, whoever be the petitioner, we must deal with the matter according to its merits. The award was made before any act of bankruptcy was committed, and the act of bankruptcy was resorted to by reason and in consequence of the award. An award has been compared to a verdict, and it has been said that a verdict, not followed by a judgment, is nothing, and that the act of bankruptcy was before the judgment; and, also, that notice of the act of bankruptcy was given to the plaintiff in the action. This comparison to a verdict is, to some extent, correct, but it does not hold throughout. An award is not only tantamount to a verdict, but it is something more, for a verdict may be set aside on grounds upon which an award could not. If this award could be questioned at all, it could only be questioned on grounds on which it might have been discharged by a Court of Law. I have not, at present, heard any reason why the award could have been effectually disputed in a Court of Law. If, however, counsel should desire to add to the argument in this respect I, for one, shall not be disposed to decline to listen to it. Subject to that, the award must stand; it is good and valid to show a debt, although there was no judgment before the act of bankruptcy; and this declaration that the award must stand must be accompanied by a right to the costs of the award.

THE LORD JUSTICE TURNER. This case is not open, in my opinion, to any fair question at all. The verdict was to be for the amount which the arbitrator should award. The whole matter was left to the arbitrator previous to the act of bankruptcy, but the judgment was not entered up till afterwards. The argument is, that this is no more than a verdict, and *Ex-parte Butterfield* is referred to in support of that view. But that argument passes by this fact, that there was a perfectly good agreement between the parties for valuable consideration, that

1854.  
 HARDING,  
 APPELLANT.  
 IN RE  
 PICKERING.  
*Judgment.*

the amount decided on by the arbitrator should be the amount recovered by the verdict. It is argued that the arbitrator was in the place of a jury; if he was so, he was in the place of a jury whose decision both parties had agreed should be conclusive on them. If the petitioner could show that the award could be impeached at Law, proceedings might have been taken in the Courts of Law to set it aside. In the absence of this the proof for the debt must stand. The petition must be dismissed, with costs; and, considering the circumstances, we shall make no order as to how the costs are to be borne.

Solicitors: *Linklater; Lowless & Nelson.*

COURT OF  
 BANKRUPTCY.  
 May 6.

### EXPARTE RAYNER, IN RE HOMMERSHAM. (a)

Before MR. COMMISSIONER GOULBURN.

Contract for the purchase of 50 shares in a mining company. Purchaser accepted bills of exchange for the amount of the purchase money. It ultimately turned out that the vendor only possessed 19 shares. On the purchaser producing the transfer for 50 shares, the officer of the company refused to register on account of the discrepancy between the number of shares named in the transfer, and the number standing in the company's books in the name of the vendor. The contract remained uncompleted at the time of the bankruptcy of the vendor.

A FEW years ago Rayner, on whose behalf the present application is made, became acquainted with the bankrupt, who was then a woolstapler, carrying on an extensive business at Bermondsey, and residing at Manningtree, where he became acquainted with one Leigh, a fellmonger. In the latter end of 1852, or the beginning of 1853, Leigh advised Rayner to invest 100*l.* in the purchase of shares in a certain mine called "East Wheal Russell"; and upon several subsequent occasions alluded to the bankrupt as holding a large number of shares therein. On the 12th of April last Rayner, Leigh, and the bankrupt dined together, at the King's Head Tavern, Poultry, and in the course of dinner the bankrupt offered twenty shares to Rayner, at 20*l.* per share, and stated that he would take his acceptance at three months for the amount in payment, upon Rayner allowing him the usual discount and stamp. Rayner agreed to take them on such terms; and the bankrupt then offered Rayner thirty more shares, at 21*l.* per share, and to take his acceptance for the amount at four months, but Rayner declined to have them upon those terms; and the bankrupt then offered them at 20*l.* per share, which Rayner agreed to take them at, and to allow the usual discount and stamp; the bankrupt, having a bill stamp in his pocket, drew a bill of exchange on Rayner for 405*l.* 8*s.* 6*d.*, which Rayner accepted: and it was then agreed (the bankrupt not having another stamp with him) that the bankrupt should send a bill for the balance to Rayner, by post,

(a) Reported by J. W. M. Fonblanque, Esq.

The purchaser satisfied the bills of exchange at maturity. *Held*, that the 19 shares were not in the order and disposition of the bankrupt.

or his acceptance. On the next day Rayner received from the bankrupt the following letter :—

“ Mr. W. Rayner.

“ Bought of A. R. Hommersham.

1854.  
EX PARTE  
RAYNER, IN RE  
HOMMERSHAM.

Statement.

	£	s.	d.
“ 30 Shares in East Wheal Russell Mine, at			
20 <i>l.</i> per share - - - -	600	0	0
Three months' interest - - -	7	10	0
Stamp - - - - -	1	12	6
	<hr/>		
	£608	2	6
	<hr/>		

“ Inclosed I send you a draft to accept for thirty East Wheal Russell shares sold you yesterday, and inclosed is an order for Mr. G. Leigh to give you transfer for the shares, or you can leave it till I see you on Friday.”

Rayner immediately saw Leigh upon the subject, when the latter at once repudiated the right of the bankrupt to deal with any of his property, whether of shares or otherwise; and Rayner sent the said bill back, with a letter complaining of the irregularity. On the 16th of April Rayner received from the bankrupt a notice, and direction to the purser of the mine, directing him to enter the transfer on the cost book. Rayner also received a bill of exchange drawn in the usual way for the purchase money and interest at four months. Rayner, fully believing the bankrupt's statement that he had at the time more than fifty shares in the mine, accepted the bill and returned the same to the bankrupt. Leigh having informed Rayner that he was going to town shortly, and would undertake to get the notice or direction duly registered at the office of the company, Rayner handed it to him accordingly; about a fortnight after this Rayner learned from Leigh that he had not been able to get the transfer registered in consequence of the bankrupt not having paid a call which had been made previous to the sale, but that he had obtained a promise from the bankrupt that such call should be paid, and requested him not to present the transfer at the office for a short time. Rayner went up to town soon after, and about the early part of May called at the office of the mine to ascertain if the bankrupt had paid the call, and found that he had not. On the 25th of May, Rayner wrote to Beechcroft, the managing clerk at the mining office, to know if the calls had been paid, and on the following day received from him the following letter :— “ I am in receipt of your favour, and beg to say that Mr. Hommersham has paid his call, and that if you send your transfer it will be registered.” Rayner, in reply to such

1854.

EX PARTE  
RAYNER, IN RE  
HOMMERSHAM.

*Statement.*

letter, informed Beechcroft that he would be in town shortly, and would call with the transfer. Rayner subsequently on the 18th of June last, presented the notice at the office, and required the fifty shares to be duly registered in his name, whereupon Beechcroft took the said transfer into his hands, and referred to the books of the mine to enter the same, but immediately afterwards stated to Rayner that he found only nineteen shares then remaining in the name of the bankrupt; and he stated also that Leigh had presented two days ago a transfer from the bankrupt of 200 shares, and that one Fauntleroy, the gentleman who had discounted one of the bills given in payment for the shares purchased by Rayner, had presented a transfer of another 100 shares, both of which he had registered, without considering whether there were sufficient left to cover Rayner's contract, and he accordingly refused to transfer the nineteen shares, upon the ground that the contract was a transfer of fifty shares. Rayner then consulted his solicitor, Mr. J. J. Hubbard, on the subject, who, with himself, made several attempts to obtain an interview with the bankrupt, but without success. Rayner afterwards heard that the bankrupt had placed his affairs in the hands of Messrs. Quilter, Ball, and Company, the accountants. Rayner and his solicitor, failing in meeting with the bankrupt, went on the 28th of June last to the office of the mine, and Rayner again formally presented the notice and demanded the registration of the same, to the extent of all the shares (not exceeding fifty) then in the name of the bankrupt; upon which Beechcroft again positively refused to register, on the ground that he could not take an assignment of fifty as an assignment of nineteen. Mr. Hubbard, finding that the bankrupt had placed in the hands of Messrs. Quilter, Ball, and Company, thirty shares in the mine, gave them the following notice:—

“ Dear Sirs,— I am instructed by Mr. William Rayner, of Manningtree, to inform you that on or about the 15th April 1853, he was, as he alleges, entrapped into a contract with a Mr. A. R. Hommersham, for the purchase of fifty shares in the East Wheal Russell Mine, and induced to sign his name to bills amounting to 1000*l.* in payment of the same, and I now produce to you the direction, signed by the said A. R. Hommersham on the said 15th April 1853, by which he directed the secretary or purser of the said mine to transfer such fifty shares to the said William Rayner. I am also instructed to inform you that Mr. Rayner, not having been able to obtain such fifty shares or any part thereof, but having heard that thirty of such shares have come into your possession, he requires, you, as the holders of such thirty shares (and without prejudice) to any criminal or

other proceedings which he may be advised hereafter to take, not to part with the same to any one but himself.

"Dear Sirs, yours, &c.

"J. J. HUBBARD."

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The notice was acknowledged by Messrs. Quilter, Ball, and Company.

On the 15th of July 1853 the bill for 40*5*l. 8*s.* 6*d.* became due, and Rayner compounded with the holder for 5*s.* in the pound, that being the then market value of the 4-10th of the shares, it being agreed by the bankrupt that the composition was not to affect his liability on the bill. The balance has been proved for against the bankrupt's estate. Rayner is still liable for the 600*l.* bill, and the holder also, who discounted the same for the bankrupt, now seeks to prove for that amount against the estate. On the 29th of October Rayner obtained from Beechcroft the following certificate:—

"I hereby certify that Rayner, with his solicitor, Mr. Hubbard, called at Mr. Murchison's office, 38. Threadneedle Street, three or four months since, and presented a transfer of fifty shares, in E. W. Russell Mine, from Mr. Hommersham to Mr. Rayner, and which said transfer I refused to register, Mr. H. not having that number of shares in his name at that time.

"M. W. BEECHCROFT."

On the same day Rayner saw Murchison, the secretary of the company, and urged him to transfer the nineteen shares into his name; and he then, after some little hesitation, promised to transfer the same on Rayner signing a memorandum on the notice of transfer of the fifty shares, of his willingness to accept the nineteen shares, part of fifty shares. Rayner thereupon left with him the certificate obtained from Beechcroft, together with a memorandum for his approval to be indorsed on the notice of the transfer, viz.: "I hereby agree to accept nineteen shares, part of the fifty shares mentioned in the above transfer, without prejudice to my claim to the remaining thirty-one shares, as against Hommersham." The words, "as against Hommersham," were inserted by Messrs. Hancock and Sharp, the solicitors to the company. On the 31st of October last Rayner received from Murchison a letter as follows:—

"If you will add the enclosed memorandum, signed and witnessed, with the calls due, 13*l.* 6*s.* 6*d.*, I will transfer the nineteen shares to you. I believe I can give you 2*l.* 5*s.* net for the shares; but if I was in a position to offer them, I might get a little more. If you do sell them, I would recommend you to

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buy a few Boringdon consols, which I could get you cheap just now,—say 21s. per share.”

Rayner, on the same day, replied as follows:—

*Statement.*

“I have to thank you for your favour of yesterday, and in reply beg to state that I cannot, at present, part with the possession of the original transfer, which is with my solicitor, Mr. Hubbard, and is required for the purpose of claiming thirty-one other E. Russell shares, belonging to me, now in the hands of Hommersham’s assignees; and as the original transfer has been produced at the office, and you have a copy showing where the original is, I trust no difficulties will arise in the transfer upon my remitting the amount of call, 12*l.* 16*s.* 6*d.*, not 13*l.* 6*s.* 6*d.*, and sending you my consent to take the nineteen shares as part of the fifty shares in the form as altered by you. I thank you for the offer of 2*l.* 5*s.*, but I am not disposed to sell at that price, nor to venture in Boringdon consols.”

Rayner subsequently saw Murchison on the subject, who refused to transfer the shares except upon production of the original transfer. On the 20th of December Rayner again wrote to him as follows:—

“If you will be so good as to send me the usual order for payment of the calls due upon the nineteen shares belonging to me, standing in the name of Hommersham, I will pay the amount with the call upon my other four shares into Messrs. Masterman’s bank. I hope shortly to be able to deposit the notice, which is still in the hands of Mr. Hubbard, so as to have the transfer made to me. Can you favour me with the present market price of the shares?”

No reply was given to this letter, and on the 27th of December Mr. Hubbard, jun., accompanied Rayner to the office of the company, and, in the absence of Murchison, left with one of his clerks the original notice of transfer, with the memorandum indorsed thereon, signed by Rayner; and at the same time induced the clerk to refer to his books and inform him what calls were due, and upon what shares; when he stated that the amount was 17*l.* 11*s.* 6*d.*, which sum was tendered to the clerk, who, however, stated that it must be paid into their bankers; and, accordingly, on the following morning, Rayner paid the amount to the bankers to the credit of the mine, and obtained a receipt for the amount. In the latter part of the same day, Rayner received in London, from his wife at Manningtree, the original transfer, which had been returned to him at Manningtree by Murchison’s clerk, with the following observation



written on the envelope: "The enclosed is returned by Mr. Murchison's order." On the 28th of December a meeting of the shareholders of the mine was held at Murchison's office, at which meeting Mr. Hancock was present. This meeting Rayner attended; and after the meeting was broken up, Murchison informed Rayner that he should not transfer the nineteen shares to him, as he had received a notice from the assignees of the bankrupt not to do so, they saying that Rayner had not paid the consideration for them. Rayner has already paid upwards of 100*l.* in respect of one of the bills (*i. e.* the bill for 405*l.* 8*s.* 6*d.*), and he is liable to pay the amount of the other bill for 610*l.* 12*s.*, with interest and costs. The mine is conducted on the cost-book principle, and among its rules and regulations is the following: "That the shares of this adventure shall be transferable by deed, or notice of transfer, in the usual form, forwarded to the committee, who shall immediately acknowledge the receipt of it to the purchaser, and register the same in the transfer books of the adventure; but no register of such transfer shall be made by the committee unless all calls which have been previously made shall have been first duly paid upon all the shares standing in the name of the party proposing to transfer any part of the same."

Hommersham has been adjudicated a bankrupt, and Rayner claimed the nineteen shares now in the hands of his assignees.

The facts were agreed upon by all necessary parties. (*a*)

Mr. *Collyer*, for the assignees, contended that the shares remaining in the bankrupt's name in the books of the company were in the order and disposition of the bankrupt at the time of the adjudication, and, therefore, passed to the assignees.

Mr. *Lucas*, for Rayner, relied on the *bona fides* of the purchase, and the adequacy of the consideration given, as well as on the efforts made by Rayner to have a proper legal transfer made to him, to take the nominal ownership of the bankrupt in the shares out of the terms of the statute, as not "being in his order and disposition, or reputed ownership, &c., with consent of the true owner." (*b*)

MR. COMMISSIONER GOULBURN. It appears clear that this was a contract by Rayner with the bankrupt, founded on a good and sufficient consideration, though the legal conditions necessary to give it effect were not satisfied at the time of the bankruptcy, but that cannot be imputed to the default or negligence of the purchaser; on the contrary, he used every effort to per-

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Argument.

Judgment.

(*a*) 12 & 13 Vict. c. 106. s. 12.  
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(*b*) 12 & 13 Vict. c. 106. s. 125.

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*Judgment.*

fect his legal title to the shares, or as many of them as the bankrupt was possessed of. I think, under the circumstances, this contract is one that would be carried into effect in Equity, notwithstanding the absence of the circumstances necessary to establish it at Law under the well-known doctrine, "*Factum est quod fieri debet*." In my opinion, the order and disposition clauses do not apply to the present case, and I must decide that the shares, now registered in the bankrupt's name, belong to Rayner.

Solicitors: *Bridger & Collins ; Hubbard.*

COURT OF  
 BANKRUPTCY.

*May 15.*

Petition to prove for money lent to a trader on the eve of bankruptcy on the security of an assignment, which was declared by the Court of Common Pleas to be void as an act of bankruptcy, and for payment in full of sums expended on the premises assigned, dismissed with costs.

*Statement.*

### EXPARTE FURBER, IN RE BARUGH. (a)

Before MR. COMMISSIONER FONBLANQUE.

THIS was the petition of Charles Furber, auctioneer and broker to the Sheriff of Middlesex (b), stating that on the 23rd of November 1850 (previous to the adjudication), the petitioner, at the request of the bankrupt (Barugh), paid to the Sheriff of Middlesex 246*l.* 11*s.*, the amount of five several executions levied on the premises of the bankrupt, and that at the time of such payment, the petitioner had no notice whatever of any act of bankruptcy committed by the bankrupt. That the sheriff, with the consent of the bankrupt, executed to the petitioner a bill of sale of all the furniture and stock-in-trade of the bankrupt, and that the petitioner entered into possession of the same, and continued in possession up to the 4th of March 1851. That the petitioner advertized the sale of the furniture and stock for the 6th of February 1851, but, at the request of the solicitors for the assignees of the bankrupt, the sale was postponed until the 4th of March, the assignees undertaking to pay the expenses of the postponement, amounting to 8*l.* 4*s.* 6*d.*, and which the assignees now refuse to pay. That at the time when the petitioner was proceeding to sell, he paid the sum of 37*l.* 15*s.* for rent and taxes, under the apprehension that distress would be levied.

On the 19th of December 1850, the petitioner sold the equity of redemption of the bankrupt's premises (which had been previously mortgaged) for the sum of 435*l.*, and paid over that sum to the official assignee, less 20*l.* for fixtures assigned to him by the bill of sale.

On the 4th and 5th of March 1851, the petitioner sold the

(a) Reported by J. W. M. Fonblanque, Esq.

(b) See *Graham v. Furber*, 2 Com. L. Rep. 10.

furniture, &c., for 330*l.* 16*s.*, and out of that sum he repaid 7*l.* 15*s.* to the purchaser of an oil tank, left on the premises at the request of the assignees, as well as the necessary expenses of the sale incurred by him, amounting to 25*l.* 11*s.* He now claimed the last-mentioned sum, the costs of postponing the sale, the sums paid by him for rent and taxes, and the value of the tank, — in all, 79*l.* 5*s.* Mr. Graham, the official assignee, and Underwood, the trade assignee, on the 12th of December, recovered the sums of 20*l.* 9*s.* and 330*l.* 16*s.* from the petitioner on the ground that the bill of sale was invalid, which sums have been paid. The petitioner holds no security for the sums claimed to be due to him, and prayed that he might be at liberty to prove for the sums paid by him on account of the bankrupt, and that he might be entitled to be paid in full such sums as he had paid for rent, &c., and the expenses of the sale.

Mr. *Lawrence*, solicitor, for the petitioner. There has been an actual advance of 246*l.* 11*s.*, which is still a subsisting debt, although the security for it has been declared void. The estate has been benefited by the withdrawal of the executions to that amount. It has also had the benefit of the rent and the other payments, which properly attached to the premises, and which must have been paid by the assignees had they been in possession.

Mr. *Bagley*, for the assignees, referred to *Graham v. Furber* (a), and read the examinations (b) of Furber, to show an arrangement to permit the bankrupt to repurchase the goods, &c. assigned by the bill of sale, and to show that notices were served, by the assignees, on Furber, requiring him not to sell, and requesting him to submit any question as to the right to the bankrupt's property to the jurisdiction of this Court (c), which he refused to do.

Furber's alleged debt arises out of a fraudulent transaction to which he was a party, with full knowledge of its intention and effects, and in which he took advantage of his position, as broker to the sheriff. He has been compelled at Law to refund the value of the property dealt with; he cannot prove for that amount: *Re Sharp* (d), *Hall v. Wallace* (e), *Columbine v. Pennell* (f), *Higinbotham v. Holme*. (g)

The payments for rent, &c., are subsequent to the bankruptcy. The Court will not strain the jurisdiction in such a case to charge the assignees. They were for the petitioner's benefit, and the necessity for his making them arose out of his original

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Statement.

Argument.

(a) 2 Com. L. Rep. 10.

(b) From the proceedings.

(c) 12 & 13 Vict. c. 106. s. 12.

(d) 3 M. D. & D. 490.

(e) 7 M. & W. 353.

(f) V. C. *Stuart*, 23rd March, 1853.

(g) 19 Ves. 88.

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*Judgment.*

wrong. There was no legal obligation against Furber. The claim for commission on the sale cannot be sustained.

MR. COMMISSIONER FONBLANQUE. The claim of the petitioner is under two heads: first, to prove for money advanced; and, second, to be paid in full certain sums expended on the property of the bankrupt, by which it has been said that the estate has been benefited. The right, under either head, depends on the construction of the Bankrupt Law Consolidation Act. (a)

Now, the whole transaction was brought before the Court of Common Pleas, and there declared to be in itself an act of bankruptcy. I am therefore precluded from entertaining any question as to its *bona fides*, or the want of notice of its legal effect as an act of bankruptcy.

The circumstance of the payment of the execution creditors, and the withdrawal of the executions, are affected by the same conditions; and if I were to admit this proof on the ground of any benefit that the estate may have received, I should make a precedent for substantiating every dealing with a bankrupt on the eve of bankruptcy, and with notice of an act of bankruptcy, in defiance of the express provisions of the statute. I must take the same view of this transaction as was taken by the Court of Common Pleas, viz., that it was intended to be for Furber's own benefit, and that it was most improper.

As to the payment made in respect of charges which are said to have properly attached to the premises, they were made by Furber in his own wrong, and, under such circumstances, he is not in a position to claim any Equity. The petition must be dismissed with costs.

Solicitors: *Trehern & White; Evans.*

(a) 12 & 13 Vict. c. 106. s. 165.

RE LOUISA SMITH. (b)

Before MR. COMMISSIONER FANE.

COURT OF  
 BANKRUPTCY.

June 2.

Bill of sale by a lodging-house keeper of all her household furniture in consideration of a bygone debt, secured by a promissory note, — Held void as an act of bankruptcy after possession taken and sale prior to the adjudication.

THE facts are fully set out in the judgment.

MR. COMMISSIONER FANE. This was an application by Miss Breeze for the value of some furniture and other property

(b) Reported by J. W. M. Fonblanque, Esq.

— Held void as an act of bankruptcy after possession taken and sale prior to the adjudication.

which had been seized and sold by Smith's assignees, Miss Breeze claiming under a bill of sale, dated the 31st of March 1853, by which the goods in question had been conveyed to her as security for a loan of 100*l.* and interest, and under which bill she had taken possession hostilely on the 21st of January 1854. On the 26th of January, Smith committed an act of bankruptcy, on which a petition in bankruptcy issued.

I was at first inclined to decide in Miss Breeze's favour, on the ground that possession had been actually taken in a hostile way four or five days before the act of bankruptcy; but, on full consideration, I am by no means sure that the decision would have been right, even if no prior act of bankruptcy had existed; but it now appears that Miss Smith had committed an act of bankruptcy by executing the bill of sale of the 31st of March 1853. As to that, it appears that Miss Breeze's original loan was made in January 1853, and was secured by a promissory note payable on demand. In March following, Miss Breeze insisted on repayment or security, upon which the deed of 31st of March was executed. Now, that deed was a substantial transfer of the whole of Miss Smith's stock-in-trade, her trade being that of a lodging-house keeper, and the deed covering all the furniture, &c., in the house. This deed was, therefore, an act of bankruptcy, under the authority of *Graham v. Chapman* (a), *Ex parte Bailey Re Barrell* (b), and *Cannan v. Smith* (c); and, therefore, there was an act of bankruptcy overriding the taking possession on the 21st of January 1854.

Solicitors: *Linklaters; Dollman.*

(a) 12 C. B. Rep. 85.

(b) 1 Bank. & Insolv. Rep. 48.

(c) 1 Com. L. Rep. 179.

#### EX PARTE EMERY, RE BRADBURY. (d)

THIS was an appeal by the petitioning creditor against an order of Mr. Commissioner *Daniell*, annulling the adjudication on the ground that the bankrupt was not a trader.

The ground on which it was contended that the bankrupt was

(d) Reported by H. C. Jones, Esq.

ownership of the bankrupt, applied to annul the adjudication, the time having elapsed after which the bankrupt himself could not apply for that purpose, and the Commissioner granted the application, on the ground that the bankrupt was not a trader within the meaning of the Bankrupt Laws. The Court of Appeal, being satisfied on the evidence that the application to annul was made at the instigation and for the benefit of the bankrupt, reversed the decision of the Commissioner, and restored the adjudication, without deciding whether the bankrupt was or was not a trader.

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RE LOUISE  
SMITH.  
*Judgment.*

LORDS  
JUSTICES.  
March 10.

A mortgagee of chattels belonging to a bankrupt, which had been sold by the assignees as being in the reputed

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EX PARTE  
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liable to the Bankrupt Laws, was, that he was a shareholder in a company, whose business consisted of getting and selling ore. The company got its ore by virtue of a deed granting a license to get minerals out of certain property. The deed did not purport to give any estate in the land, but only a right (not exclusive) to enter and dig for the minerals. No fixed payment was reserved, but payment was to be made to the owners of the land at a specified rate, according to the quantity of minerals actually obtained.

Bradbury was adjudicated bankrupt on the 12th of August 1853. On the 17th of August, Susanna Alcock, a sister of the bankrupt's wife, gave notice to the assignees that the furniture in the bankrupt's house had been assigned to her by bill of sale, dated 2nd of July 1853, as a security for a debt due from him to her. The goods were taken, however, by the assignees, and sold as being in the order and disposition of the bankrupt. Upon this Mrs. Alcock commenced an action of trover against them on the 7th of December, and then presented a petition to annul the adjudication, on the grounds of there being no good petitioning creditor's debt, and that there was no trading. The petitioning creditor disputed the fact of there being anything due to Mrs. Alcock, and stated by his affidavit that he believed that the application was made at the instance of the bankrupt, and to relieve him from the effect of his having admitted at his examination on the 17th of November 1853, that he had within six months preceding that time lost more than 20*l.* in one day by bets upon horses. Mrs. Alcock did not file any affidavit contradicting this. It was stated that she was too ill to be able to attend in Court to be examined. The Commissioner decided that there was a good petitioning creditor's debt, but that the bankrupt was not a trader; and considering that the bringing of the action rebutted the charge of collusion between Mrs. Alcock and the bankrupt, he annulled the adjudication.

*Argument.*

Mr. *Swanston*, and Mr. *De Gex*, in support of the appeal, contended that the bankrupt was a trader, as being a partner in a company getting and dealing in ores, such ores not being the produce of their own land. The course of the company was to work for the ores under a license from the owner of the land, giving them no estate whatsoever in the land, they paying the stipulated sums for the privilege of getting the ores. Thus the company were mere buyers of minerals from the landowners at a stated price, which minerals they sold after dressing and preparing them for sale. This was a buying and selling of chattels, and had the legal effect of rendering the company traders within

the meaning of the Bankrupt Laws: *Exparte Harrison*. (a) The cases of *Parker v. Wells* (b), and *Sutton v. Wheeler* (c), and the observations of Lord *Tenterden* in *Doe v. Wood* (d), were cited, and also various other cases which, as the decision did not turn on this point, do not need further notice. They contended, further, that the Court would not affirm the Commissioner's decision annulling the adjudication, but leave Mrs. Alcock to her remedy at law against the assignees in respect of the goods, and cited *Exparte Maxwell* (e), *Exparte Bowers* (f), and *Exparte Bower* (g), as showing that the Court might refuse to annul an adjudication, even when invalid.

Mr. *Bacon* and Mr. *Speed* were requested by the Court to confine their arguments, in the first place, to the question whether the Court ought, in the exercise of its discretion, to annul in the particular circumstances of the case. They contended that no case of collusion between Mrs. Alcock and the bankrupt was made out, and that after the expense of the present proceedings had been incurred, the Court would not oblige her to incur further expense by trying the validity of the adjudication at Law. The argument on the question of trading was not proceeded with.

Mr. *Swanston* was not called upon to reply.

THE LORD JUSTICE KNIGHT BRUCE. It is not necessary to give any opinion on the question whether this bankrupt was a trader, but I will assume, in the respondent's favour, that he was not. The adjudication took place in August last, and the bankrupt is precluded by lapse of time from questioning it. (h) Whether it be good or bad, it must, as against him, be treated as good. If the application to annul had been by him, it is conceded that it must have failed. The party applying is Mrs. Alcock, who lived with the bankrupt, and had a bill of sale of his furniture to secure a debt, or alleged debt, probably a true debt, from him to her. The assignees sold these goods as being in the reputed ownership of, and within the order and disposition of, the bankrupt. If the adjudication be invalid, Mrs. Alcock can recover damages at Law for the conversion. After the time had elapsed after which the bankrupt could not dispute the validity of the adjudication, he admitted an act of gambling sufficient to preclude him from ever obtaining a certificate. After this an application to annul the adjudication is made by

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EXPARTE  
EMERY, RE  
BRADBURY.  
Argument.

Judgment.

(a) 1 B. C. C. 172.

(b) 1 T. R. 34.; 1 B. C. C. 178. n.

(c) 7 East, 442.

(d) 2 B. & Ald. 724.

(e) 3 M. D. & De G. 708.

(f) 1 De G. M. & G. 460.

(g) 1 De G. M. & G. 468.

(h) 12 & 13 Vict. c. 106. s. 233.;

*Exparte Carter*, 1 De G. M. & G. 212.; S. C. sub. nom. *Carter v.*

*Dimmock*, ante 12. & 4 H. L. Cas. 337.

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EMERY, RE  
BRADBURY.*Judgment.*

Mrs. Alcock. The petitioning creditor has filed an affidavit, stating his belief that this application has been made at the instance of the bankrupt and for his benefit. The bankrupt has made no affidavit before us, nor has Mrs. Alcock. It may be well understood that she was not able to attend to be examined, but she might have made an affidavit, and she actually did make one in the Court below. The affidavit of the petitioning creditor is, therefore, wholly uncontradicted. It is, on these materials, impossible not to come to the conclusion that the application to annul was that of the bankrupt, made in the name of his sister-in-law, Mrs. Alcock. Under these circumstances we are of opinion that, in the exercise of a sound judicial discretion, we ought to allow the adjudication to remain. Mrs. Alcock's right of proceeding at Law we do not interfere with, but for my own part I am of opinion that the costs of the application to the Commissioner ought to be paid by her.

THE LORD JUSTICE TURNER. I am of opinion that it would be very dangerous to allow other parties to take proceedings at the instance of a bankrupt to annul the adjudication, when he himself clearly could not do so. Here we have a distinct affidavit by the petitioning creditor, that he believes the present proceedings to annul are taken at the instigation of the bankrupt, and there is no evidence to contradict this. It is said that the facts of the case show the belief to be ill-founded, but I think that the facts tend the other way. Mrs. Alcock did not make any application to annul, until after the bankrupt had admitted the commission of an act which would prevent his ever obtaining a certificate. I think she must pay the costs of the proceedings before the Commissioner. The petitioner's costs of the present appeal must come out of the estate, and there will be no order as to Mrs. Alcock's costs of the appeal.

Solicitors: *William Berry ; Ivimey.*

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

June 20.

A discharge on bail being clearly given by sect. 38. of 1 & 2 Vict.

c. 110. the Court will rather enlarge

than curtail the privilege. Where, therefore, matters were shown in evidence against L., which the Court intimated would be taken into consideration in giving judgment, on application, the bail was enlarged, and the insolvent discharged until his adjourned hearing.

RE DAVID MOSS LYONS. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, who had filed a petition under 1 & 2 Vict. c. 110., and had been discharged on bail, appeared to be heard. He had petitioned the Court in October last, under the pro-

(a) Reported by E. H. Reed, Esq.



tection statutes, as a trader, but owing debts amounting in the whole to less than 300*l*. He did not appear on his interim order, and the case was struck out of the list. Being taken in execution by a creditor whose debt was set out in the schedule, he applied to the Court to dismiss his petition, alleging as an excuse for his nonappearance, that subsequently to presenting the petition, his father, who had advanced him money, which he had received as a gift, had claimed to be a creditor in respect thereof; and believing the point would be made against him, and his debts, in consequence, increased beyond 300*l*., he had not appeared, as officers were in attendance to take him in execution. The petition was dismissed, and the insolvent then filed another under the prison statutes, upon which he appeared to-day. The debts now amounted to considerably more than 300*l*., there being many creditors inserted whose names were entirely omitted from the former schedule. The case being adjourned for further evidence, Mr. *Nicholls* applied that bail may be enlarged.

Mr. *Sargood* objected, and called the attention of the Court to the allegations of the former schedule. The insolvent had sworn "that your petitioner has examined the said schedule, and that such schedule contains a full and true account of your petitioner's debts, and the claims against him, with the names of his creditors and claimants, and the dates of contracting the debts and claims severally." There could be no mistaking the phraseology of the petition; the insolvent was fully aware to what he had pledged himself, and it was idle to urge the excuse of forgetfulness as an answer to the omission of a variety of creditors. The process of the Court had been abused, inasmuch as the insolvent had sworn to facts which he knew to be untrue, and he was the last man to whom the indulgence of bail ought to be granted.

Mr. *Nicholls*. It was an entirely new principle to punish a person under one petition for errors committed under another. If the insolvent had misconducted himself, he had been punished; the former petition was dismissed, and the expenses attending it had conferred no corresponding benefit on the petitioner. If perjury had been committed, an indictment was the remedy, but as far as the present petition was concerned no wrong had been done, and the Court could not import the errors of a former petition into the present application. The insolvent must now be judged under the prison statute, and if the creditors had a complaint they would there find an ample remedy.

MR. COMMISSIONER MURPHY. The Act of Parliament

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RE DAVID  
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RE DAVID  
MOSS LYONS.*Judgment.*

leaves the discharge of an insolvent on bail entirely in the discretion of the Court; but the privilege being clearly given, I would rather enlarge than curtail it. I do not mean to say I am satisfied with the conduct of the insolvent. I am not; but I do not wish to derogate from a privilege the Legislature has expressly granted. When I discharge on bail I consider two things; in the first place, will the insolvent appear? In the second place, if he does not, will the bail be available? I have no reason to doubt here either the one or the other proposition; and I shall, therefore, allow the insolvent to be at liberty until the adjourned hearing; but I do not mean to say that I shall not then take the matters that have been proved before me to-day into consideration in giving my judgment.

Attorney: *Govett.*

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

June 20.

The Court has power, under sect. 10. 7 & 8 Vict. c. 96., to make an order for the payment of the costs of petitioning out of an insolvent's estate.

*Judgment.*

RE PHILIP JOHN JAMES. (a)

Before MR. COMMISSIONER MURPHY.

MR. DUNCAN moved that the balance of costs due to the insolvent's attorney be paid out of assets in Court to the credit of the estate.

MR. COMMISSIONER MURPHY. The Act neither expressly provides nor prohibits the allowance of costs to an insolvent's attorney; but the 10th section enacts that an allowance may be made to an insolvent for his support; and in granting applications of this description, the Court acts under this section. The attorney may have the balance of costs due to him, but the motion must be for an allowance to the insolvent.

Attorney: *Daniell.*

(a) Reported by E. H. Reed, Esq.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

June 21.

An insolvent who is in custody for damages recovered in an action brought against himself and wife for a slander committed by the wife is in custody within the meaning of the 78th section, 1 & 2 Vict. c. 110., and the plaintiff in such action is entitled to an adverse adjudication thereunder against such insolvent.

RE JOHN BUCKWELL. (b)

Before THE CHIEF COMMISSIONER.

THE insolvent, who described himself as a carpenter and builder, appeared on his order for hearing. He was opposed by

(b) Reported by E. H. Reed, Esq.

the detaining creditor, who had brought an action against him and his wife for slander committed by the wife. It was admitted the insolvent had declined to apologize when the writ was issued, and he justified the fact by declaring a disbelief in the complaint alleged against his wife. At the trial witnesses were called for the plaintiff and the defendant, and a verdict was returned for 40*s.* damages. The costs were taxed at 33*l.* 17*s.* 4*d.* Subsequently to judgment being signed the insolvent had offered 10*l.* in satisfaction of the damages and costs, with an intimation that this Court would be applied to in the event of the offer being refused. The plaintiff declined the offer, and shortly after the insolvent was taken in execution at his suit.

Mr. *Nicholls* submitted that the plaintiff was entitled as of right to a judgment under the 78th section.

Mr. *Sargood*, for the insolvent contended, the true construction of the Act could refer only to a slander committed by the husband. No moral responsibility attached to him for the misconduct of his wife, and it would be a monstrous addition to his legal obligations to remand him to prison, and punish him for an act of which he was entirely innocent: *Larkin v. Marshall* (a) contained a *dictum* of Alderson B., illustrating the true construction of a similar section in the Bankrupt Law Consolidation Act (b): *Larkin v. Marshall* was an application for the discharge of a married woman, who had been taken in execution for damages recovered in an action against herself and her husband, for an assault committed by the female defendant. Subsequently to the action the husband obtained the protection of the Bankruptcy Court, and Mr. Baron *Parke* in the course of the argument, said: "It appears that the husband cannot be taken in this case, as he has a protecting order under the Bankruptcy Act: is there any precedent for the discharge under such circumstances?" Mr. *Bovill*, who moved the rule then said: "The order for protection would not have authorized the discharge of the *bankrupt*, if *he* had been taken; for it is a debt upon a judgment in an action for an assault, which is expressly excluded by the 12 & 13 Vict. c. 106. s. 112." Mr. Baron *Alderson* then said: "That must mean an assault by the husband. Here the wife committed the assault."

Mr. *Sargood* urged that the construction of the section of the Insolvent Debtors Act ought to be perfectly analogous to that of the 112th section of the Bankruptcy Act; and if the words in the latter statute applied only to an assault committed

1854.  
RE JOHN  
BUCKWELL.  
Statement.

Argument.

(a) 19 L. J. (N. S.) Exch. 160.

(b) 12 & 13 Vict. c. 106. s. 112.

1854.  
 RE JOHN  
 BUCKWELL.  
*Judgment.*

by the husband, the words in the former statute ought to bear the same limited interpretation.

THE CHIEF COMMISSIONER. In the case cited the point was not before the Court, it was only introduced incidentally. However, I am of opinion, that this man is in custody within the meaning of the Act. "If he shall be in custody for damages recovered in any action for slander." Those are the words, and it is clear that he is in custody for damages recovered in an action for slander. The case is to be regarded as one of small importance. The words are awkward (referring to the slander alleged); but it does not appear the insolvent was present when they were spoken, or that he had cause to believe his wife had so far committed herself. Practically, the serious matter here is the costs. Evidence has been given that an apology was proposed, but the insolvent was ignorant of the words being spoken, and he refused to make it. My note on the application for sureties is, "Perhaps I shall think this man has suffered enough by the arrest of himself and wife, unless I have additional evidence of circumstances." It appears by the special balancesheet that, long after the action,—two months or more,—the insolvent received in different sums upwards of 100*l.*, and I think it is to be lamented that he did not make use of a part of it to meet the calamity that had occurred. I think he might have done better than have come to this Court. What reason the plaintiff had for going to trial on such words, I do not know; I have no evidence, and I cannot estimate his inducement; but I do not feel surprised the offer of 10*l.*, which the insolvent eventually made, was declined, as great expenses were then incurred. The insolvent will be discharged in three months.

Attorneys: *Nicholls & Clark; Columbine.*

*Note.*—Although the Court expressed its opinion that the case was within the 78th section, yet the adjudication was made under the 76th section, the discretionary clause.

COURT FOR  
 RELIEF  
 OF INSOLVENT  
 DEBTORS.

July 12.

Although the Court is not empowered under the protection statutes to give costs *eo nomine*, yet they will be allowed, under the head of expenses of getting in the estate, to creditors, whose opposition results in bringing money into Court.

### RE WILLIAM BOOTH. (a) Before THE CHIEF COMMISSIONER.

THE insolvent, a petitioner for protection, appeared on his interim order. He was opposed by counsel on behalf of a creditor,

(a) Reported by E. H. Reed, Esq.

and being desirous to avoid an opposition, it was agreed, before the case was called, that if the opposition were withdrawn, a sum of 20*l.* a year would be set aside for the gradual payment of the debts in the schedule.

Mr. *Sargood* applied for the costs of the opposition, which had benefited the general body of creditors.

THE CHIEF COMMISSIONER said he could not make an order to allow the costs of the opposition *eo nomine*, but he would order the costs to be paid under the head of necessary expenses in getting in the estate.

Attorneys: *Lewis & Lewis; Marshall.*

1854.  
RE WILLIAM  
BOOTH.

*Judgment.*

### RE JOHN ELI BAKER. (a)

Before THE CHIEF COMMISSIONER.

THE insolvent, a boot and shoemaker, appeared on his interim order. He was opposed by a Mr. Pratt, to whom he was indebted 76*l.* It appeared that on the last dealing between the parties, the insolvent had offered a bill for the whole amount, which Mr. Pratt had consented to receive, provided the insolvent's son, who was present, joined in the acceptance. The son, accordingly, by the desire of his father, accepted the bill, "J. E. Baker and Son;" but he had no interest in the business, and was otherwise engaged on his own account. It did not appear that any other bills had been accepted by the son jointly with his father.

Mr. *Sargood* suggested the insolvent should describe himself according to the acceptance on the bill.

THE CHIEF COMMISSIONER said, the transaction seemed to be a solitary one; and as the son had no interest in the business, he did not think such a description necessary.

Attorney: *Marshall.*

(a) Reported by E. H. Reed, Esq.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

July 17.

B., at the desire of his opposing creditor, accepted a bill, "J. E. Baker and Son." The son had no interest in the business, and the transaction was a solitary one.—*Held*, that the description which omitted J. E. Baker and Son was sufficient.

### RE ALFRED SCHOLEY. (b)

Before MR. COMMISSIONER MURPHY.

THE hearing of the insolvent on his interim order was appointed for to-day. Counsel had been instructed to support

(b) Reported by E. H. Reed, Esq.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

June 28.

Although an insolvent fails to appear on the day appointed for his examination, the creditors are entitled to prove their cases, and to call witnesses.

tion, the creditors are entitled to prove their cases, and to call witnesses.

1854.

RE ALFRED  
SCHOLEY.*Statement.*

the petition; but on the case being called the insolvent did not appear. A number of creditors attended to oppose; some of them in person, and others by counsel. The schedule alleged a considerable debt owing to the insolvent, from his father and brother, and the nonappearance of the petitioner was attributed to an arrangement that had been made amongst the family for the payment of the creditors.

*Argument.*

Mr. *Sargood* denied there being the slightest foundation for the suggestion that had been offered. The brother of the insolvent was in Court, prepared to contradict the statement respecting himself and his father, and he proposed to call him for that purpose, and further to examine his clients, with respect to their complaints.

Mr. *Reed* objected to evidence being taken in the absence of the insolvent. The fourth section of 5 & 6 Vict. c. 116. clearly contemplated the presence of the petitioner at the hearing. The words of the Act were, that on a certain day the Commissioner should "proceed to examine on oath the petitioner, and any creditor who may attend such examination, and any witness whom the petitioner or any creditor may call." It was clear, therefore, the Court could not proceed in the case, unless in the insolvent's presence. Besides, supposing one of the proposed witnesses should commit perjury, what issue could be alleged in an indictment? It could not be suggested, that on the hearing of one Alfred Scholey, a statement had been made which was untrue, because the evidence would show that such a person had never appeared before the Court.

*Judgment.*

MR. COMMISSIONER MURPHY, having consulted with the CHIEF COMMISSIONER, said he should hear the creditors, and any witnesses they pleased to call. They appeared upon the invitation of the insolvent, and they had a right to be heard. If the insolvent at a future time desired permission to appear, there would then be some evidence to guide the Court in receiving the application.

Attorney: *Barrow*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

July 11.

Where an  
insolvent has  
been dis-  
charged under  
1 & 2 Vict.

RE WILLIAM HENRY HOWE. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, a baker, had petitioned the Court under 1 & 2 Vict. c. 110., and was discharged on the 23rd of February in

(a) Reported by E. H. Reed, Esq.

the present year. On the 5th of July following he had appeared at the County Court holden at Southwark, in obedience to a summons which had been issued at the suit of one S. Kardel, whose debt was set out in the schedule, to show cause why he should not be committed for the nonpayment of 2*l.* 9*s.* He had produced his adjudication to the Judge, who, notwithstanding, ordered him to stand committed for a period of fourteen days. On the following day he was taken to prison.

Mr. *Sargood* now moved, on an affidavit which verified the above facts, for his discharge.

MR. COMMISSIONER MURPHY granted the application, but he subsequently stated he had looked into the Act of Parliament, and the 90th section provided, "That no person who shall have become entitled to the benefit of this Act by any such adjudication as aforesaid shall at any time thereafter be imprisoned by reason of the judgment so as aforesaid entered up against him or her, according to this Act, or for or by reason of any debt, or sum of money, or costs, with respect to which such person shall have become so entitled, or for or by reason of any judgment, decree, or order for payment of the same; but that upon every arrest or detainer in prison upon any such judgment so entered up as aforesaid, or for or by reason of any such debt, or sum of money, or costs, or judgment, decree, or order for payment of the same, it shall be lawful for any Judge of the Court from which any process shall have issued in respect thereof, and such Judge is hereby required, upon proof made to his satisfaction that the cause of such arrest or detainer is such as hereinbefore mentioned, to release such prisoner from custody." The County Court, therefore, was the proper Court to apply to for relief, inasmuch as the process issued from that Court. The protection statutes armed this Court, under similar circumstances, with the power to grant relief, but as the 1 & 2 Vict. c. 110. limited the power of discharge to the Court out of which the process issued, the application must be refused.

Attorneys: *Nicholls & Clarke.*

1854.

RE WILLIAM  
HENRY HOWE.

*Statement.*

c. 110., and is subsequently committed to prison by the order of a County Court Judge for the non-payment of a debt which is set out in the schedule, this Court has no power to order a discharge.

*Judgment.*

## RE GEORGE RUFFEL. (a)

Before MR. COMMISSIONER MURPHY.

THE insolvent, a petitioner under the prison statutes, had been heard before *The Chief Commissioner* on the 24th of July last past. He was not opposed, but in consequence of some

(a) Reported by E. H. Reed, Esq.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

August 15.

Where an insolvent applies to be discharged on bail until

1854.

RE GEORGE  
RUFFEL.

his adjourned hearing, the detaining creditor is entitled to oppose the application, although he did not appear on the occasion of the original hearing.

*Argument.*

services on creditors being defective, and an inaccuracy appearing in the description, his case was adjourned to a further day. He now applied to be discharged on bail until his adjourned hearing. The application was opposed on behalf of the detaining creditor.

Mr. *Reed* objected to the opposition. As far as the detaining creditor was concerned, the case was concluded. He had been invited to attend the original hearing, but he had not appeared. The case was adjourned for a specific purpose to perfect services, and to correct an inaccuracy in the description. When the purpose of the adjournment was completed, the insolvent would be entitled to his discharge. No creditor could oppose on the adjourned order, otherwise two opportunities would be given for complaint, when the Act of Parliament only contemplated one. The case was analogous to that of *Mary Ann Cann.* (a) There several creditors had been entered with respect to a bill of exchange. On the interim order, one of them, who was not the holder of the bill, appeared to oppose; but on its being objected by counsel, that as the party appearing was not the holder of the bill he ought not to oppose, a day was named for the final order, with an intimation that the point would be considered in the meantime. On the hearing of the final order, the creditor again appeared, accompanied by a second creditor; but as neither of them were the holders of the bill, it was still objected that they could not oppose, and the case was again adjourned that the objection might be considered. On the third appearance of the insolvent the holder of the bill attended to oppose, and it was then objected that as the case had been adjourned for a specific purpose, and as the holder had not taken advantage of the opportunities allowed by the Act of Parliament, he was then too late. The Court held both objections good, and granted a final order. It was submitted, therefore, the detaining creditor ought not now to be heard.

*Judgment.*

MR. COMMISSIONER MURPHY said the Act of Parliament was clear upon the subject. The detaining creditor was to have notice of an application for a discharge on bail, and he was entitled to oppose the discharge. He had received the usual notice in this case, and had been invited to attend, and the Court could not now refuse to hear him. However, the fact of his not appearing on the original hearing would be a matter for consideration, if he made any case against the bail.

Attorney: *Eliot.*

Objection overruled.



## EXPARTE ASSIGNEES OF QUICK, RE QUICK. (a)

Before MR. COMMISSIONER FANE.

1854.  
COURT OF  
BANKRUPTCY.  
June 17.

THE facts of this case will sufficiently appear from the judgment.

Mr. *Taylor* (solicitor) for the assignees.

Mr. *Lucas* for Messrs. *Didisheim and Company*.

Act of bankruptcy by conveyance (by way of assignment for benefit of creditors) of all the trader's estate on the 8th of March; adjudication on the 10th; between the 8th and 10th, Messrs. D., creditors of the bankrupt, obtained goods, which they applied in part payment of their debt. On the application of the assignees (who were also trustees under the assignment) to have the value of the goods repaid to the estate by Messrs. D.,—*Held*, that at the time of the delivery of the goods to Messrs. D. the bankrupt was the agent of the trustees, and that the transaction between Messrs. D. and the bankrupt was *bonâ fide*, and protected under 12 & 13 Vict. c. 106. s. 133.

*Judgment.*

MR. COMMISSIONER FANE. This was an application by the assignees of Quick, that Messrs. *Didisheim and Co.* should be ordered to return to the estate 29*l*. The facts are that Messrs. *Didisheim*, who are London silversmiths, were induced by the bankrupt, who was a silversmith at Bristol, some time before March last to let him have some goods of the value of 254*l*. on sale or return. Early in March, something having occurred to excite the suspicions of Messrs. *Didisheim*, one of the firm went down to Bristol to look after the property; and, on the 10th of March, finding the goods sold and no money forthcoming, he by urgency obtained, on purchase, some goods of the value of 29*l*., which were on the bankrupt's counter, and took them away. On the 14th of March, a petition of bankruptcy issued against Quick, on which he was adjudged bankrupt upon an act of bankruptcy committed on the 8th of March, by assigning, by deed of that date, all his stock-in-trade, &c. &c. to trustees for his creditors; and now his assignees claiming under that petition and act of bankruptcy, and thus dating back their title to the 8th of March, claim the goods delivered to Messrs. *Didisheim* on the 10th, as their goods. Messrs. *Didisheim* say, "No: we knew nothing on the 10th of the act of bankruptcy of the 8th; and therefore we are protected by s. 133. of the Bankruptcy Law Consolidation Act (b), which provides that *all contracts, dealings, and transactions* with the bankrupt really and *bonâ fide* made and entered into before the filing of a petition in bankruptcy, shall be valid, notwithstanding any prior act of bankruptcy, provided the person so dealing had not at the time notice of any prior act of bankruptcy." They say they had no notice of the deed of the 8th; and that therefore the transaction with them, which was before the 14th, was protected. To this the assignees reply, that the transaction of the 10th was not protected by that statute because the property Messrs. *Didisheim* took on that day was not the property of the bankrupt, but of the trustees under the deed of

(a) Reported by J. W. M. Fonblanque, Esq.

(b) 12 & 13 Vict. c. 106.

1854.  
 EXPARTE  
 ASSIGNNEE OF  
 QUICK,  
 RE QUICK.  
*Judgment.*

the 8th; to which it is again replied by Messrs. Didisheim, that that deed was a fraudulent deed, as being an act of bankruptcy, and therefore void; to which it is replied by the assignees, that it was not void, but voidable only, namely, by bankruptcy, and and that it was a valid deed between the 8th of March and the 14th, the date of the bankruptcy; that it was in that interval that the transaction took place; and that, therefore, when Messrs. Didisheim purchased, on the 10th, the property in question, they were buying of the bankrupt that which was not his to sell, for it belonged to the trustees. I have carefully considered these conflicting views; and, on the whole, I am of opinion that Messrs. Didisheim are entitled to keep what they have got.

Suppose the question had arisen between the trustees under the deed of the 8th of March, and a common customer, who had come in to Quick's shop after the 8th, and bought and paid for the goods, could the trustees have set aside the transaction, or sued the customer in trover for the goods, and left him to his remedy against Quick for the purchase money? Surely not. Surely the law would have held, that so long as the trustees under the deed acquiesced in Quick staying in the shop and remaining apparent owner of the property, notwithstanding the deed, they practically made him their agent to conduct the business, and would be bound by his acts. If this would have been the law, as it clearly would have been, between the trustees and an ordinary customer, it must be so between them and Didisheim. They, therefore, could not recover against Didisheim.

Then, can the assignees recover? They cannot through the trustees. If they can, it must be on the ground that the deed of the 8th was an act of bankruptcy, and voidable as such, and afterwards rendered void by the petition in bankruptcy and adjudication, and that, therefore, their title commenced on the 8th of March, by relation back. But to that argument the answer is, that Didisheim is protected against that relation by the 133rd section of the Consolidation Act, which protects all *bonâ fide* transactions, between the act of bankruptcy and the actual bankruptcy, in favour of persons having no notice of the act, and it is not even suggested that Messrs. Didisheim had notice.

It was strongly urged upon me by the solicitor to the bankruptcy, that, as the purchase took place after the deed of the 8th, and that deed was not void, but only voidable, the title created by that deed was good, till actually avoided; but I do not think that that is the principle of law, in reference to void-

able acts. I think the great principle of law is, that where any act voidable in law is avoided, every thing done under the voidable act is avoided also. That is the main and governing principle, though I admit that, where the absolute exigencies of justice required it, some qualification might be introduced. Still that is the principle, and here the exigencies of justice not only do not require any qualification of it, but, on the contrary, they absolutely demand an exact adherence to it. The justice of the case is evidently with Messrs. Didisheim. They must, therefore, be allowed to keep the 29*l*.

Solicitors: *Taylor & Collinson.*

1854.  
EX PARTE  
ASSIGNEES OF  
QUICK,  
RE QUICK.  
*Judgment.*

### RE THOMAS FISHER. (a)

Before MR. COMMISSIONER MURPHY.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

*July 18.*

THE insolvent, a petitioner under the 1 & 2 Vict. cap. 110., appeared to be heard. He had been arrested by his son-in-law, on account of a debt for money lent. There was no doubt the arrest was friendly, but the insolvent was in an evident condition of embarrassment. His debts amounted to 760*l*., and he had been sued by six of his creditors in the County Court, and by two in the Superior Court, and each of them had a judgment against him. He swore he had no present means of living, and that he was indebted to friends for his support whilst in prison.

Where an insolvent is in an evident condition of embarrassment, and no case is proved against him, the Court will not dismiss the petition, although the arrest be friendly, and there are no assets to be divided amongst the creditors.

Mr. *Caarten* opposed on behalf of a dress-maker, who claimed from the insolvent the balance of an account for dresses supplied to his wife and daughters. Beyond the fact of the accounts being unpaid, there was no ground for complaint. It was urged the petition must be dismissed, as the arrest was friendly, and there were no assets to be divided amongst creditors. The Court never countenanced a collusion between an insolvent and his detaining creditor, unless an ample equivalent in the shape of a sum of money was paid into Court; and the reason was obvious; a remand would carry with it no punishment, since the detaining creditor would immediately discharge the insolvent. The practice of the Court had been for years, to dismiss a petition where the arrest was friendly, and the insolvent gave up nothing to his creditors.

*Statement.*

Mr. *Reed* urged the petition ought to be sustained. The usual reason for a dismissal did not apply. No case had been

*Argument.*

1854.

RE THOMAS  
FISHER.*Argument.*

made against the insolvent, no reason for a remand given, and therefore, there could be no reason why he should not be discharged: it was evident no power but that of the Court could relieve him from his embarrassments: the object of the Act was relief: the condition of the insolvent demanded that relief: he was indebted in large sums, and utterly incompetent to meet his liabilities: if the principle urged prevailed, a curious result would follow; — the petition of an honest man would be dismissed, where the arrest was friendly, if he brought no assets into Court; whereas the petition of a dishonest man would be sustained, notwithstanding a friendly arrest, if by means of a fraud he managed to give up something to creditors. If the insolvent had not been a trader, or being a trader, if he had owed less than 300*l.*, he would have undoubtedly obtained a final order under the protection statutes; but if the argument prevailed, the accident of his being a trader, and owing above 300*l.*, although it increased his difficulties, deprived him of all relief. If a creditor out of spite or malice had imprisoned the insolvent, no objection could have been made to his discharge; but, inasmuch as a friend had commiserated his condition, and to relieve him had caused his arrest, it was argued the petition must be dismissed. If the Court upheld that doctrine, the detaining creditor would in effect lose his debt, because he would discharge the man he pitied, and thereby debar himself for the future from all legal remedy for its recovery, and as he had simply exercised a right approved of by the law, there was no reason to prejudice his position.

*Judgment.*

MR. COMMISSIONER MURPHY said he should sustain the petition. The condition of the insolvent was that of evident embarrassment. His debts amounted to a very considerable sum, and he was without the means of living; it was hopeless to expect that any individual exertion would ever enable him to liquidate his liabilities, particularly as he must labour under the fear of the judgments that were against him being carried into effect. No fraud had been proved against the insolvent, no imputation affected his character, and the Court would believe his difficulties were the result of misfortune. It had been urged the doors of the prison ought not to be opened immediately to a man who had consented to be arrested. But why should they be closed upon him? No wrong had been committed; no creditor even suggested an offence. A friend had arrested him; and it was obvious the condition of the insolvent required the interference of the Court. If he had subjected himself by his method of dealing, or otherwise, to a remand, the petition would

have been dismissed; but as the case was one of misfortune and not of dishonesty, the insolvent would be discharged. (a)

Attorney: *Beart*.

(a) *Re William Calt*, 1 Bank. & Ibid. 65.; *Re Timothy Stafford*, Insolv. Rep. 37.; *Re Marcus Bain*, Ibid. 249.

1854.

RE THOMAS FISHER.

Judgment.

## RE JAMES GIDDINGS. (b)

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, a petitioner under 1 & 2 Vict. c. 110., appeared to be heard.

Mr. *Sargood* said he opposed; but it appearing that no notice of opposition had been given,

MR. COMMISSIONER PHILLIPS said he could not admit the opposition; the rule of Court (c) required that notice should be entered in the book kept for that purpose in the office of the Court, and that rule not having been complied with, the creditor could not be heard.

Attorney: *Reed*.

(b) Reported by E. H. Reed, Esq. :

(c) Rule 22.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

July 22.

Where a creditor fails to give notice of his opposition, according to the rules of Court, he will not be admitted to oppose.

Judgment.

## RE FREDERIC WESTON. (d)

Before MR. COMMISSIONER MURPHY.

THE insolvent, a petitioner under 1 & 2 Vict. c. 110. applied to be discharged on bail.

Mr. *Reed* opposed for the detaining creditor, and put in evidence the proceedings in an action which he had brought against the insolvent. The declaration was for goods sold and delivered, and on an account stated. The insolvent had pleaded to the action; but after issue joined, he had withdrawn his plea and consented to a judgment for the amount sought to be recovered. The costs had been increased by the plea about 12l. It was proposed to call evidence to prove the facts of the case.

(d) Reported by E. H. Reed, Esq.

COURT FOR  
THE RELIEF  
OF INSOLVENT  
DEBTORS.

Aug. 15.

Where on an application on sureties the record in an action between the insolvent and his opposing creditor shows a clear case for remand, a discharge on bail will be refused; but where the record simply proves the existence of a debt, and other evidence is necessary to

bring the case within the penal provisions of the Act, the Court will not go into further evidence, but will grant an insolvent the privilege of bail.

1854.

**RE FREDERIC  
WESTON.***Judgment.*

MR. COMMISSIONER MURPHY said, If the record had shown a clear case for remand, he should have refused a discharge on sureties (a); but it simply proved the existence of a debt. The insolvent may have subjected himself to a remand for vexatiously defending the action; or he may have a perfect justification for his proceeding. At present the Court would not go into evidence, but would grant the insolvent the privilege of bail. When he came up to be heard, the creditor would have an opportunity of making his complaint.

Attorneys: *Lewis & Lewis.*

(a) *Re Lindus*, 1 Bank. & Insolv. Rep. 150.

## EXPARTE NEWCOMBE, IN RE GRIFFITHS AND NEWCOMBE. (b)

COURT OF  
BANKRUPTCY.

Aug. 26.

The sums to be recovered by intending emigrants against shippers or agents failing to provide them with passages according to contract, provable in bankruptcy.

A bankrupt cannot be arrested and committed to prison for breach of contract in failing to provide passages, after he has obtained protection.

*Argument.*

Before MR. COMMISSIONER FONBLANQUE.

THE bankrupt Newcombe, after having surrendered to the adjudication, and after having obtained his order for protection from arrest, was taken into custody for a breach of the Passengers' Act (c), in failing to return passage money as compensation, to certain persons with whom he had contracted to provide passages as emigrants, which passages he had been unable to provide. This was the application of the assignees for the discharge of the bankrupt, in order that he might be enabled to make up his accounts.

Mr. *Plews*, solicitor, for the assignees. The intention of the statute is to give compensation to emigrants, in case of breach of contract by shippers or their agents. The enactment as to imprisonment in default is to enforce the payment, but not by way of penalty. No statute ought to be construed to create offences, unless such intention be most clearly expressed.

Mr. *Maynard*, solicitor, *contra*. It is clearly the intention of the legislature to protect persons placed in the helpless position of emigrants, by imposing penal consequences on those breaking faith with them. The words "penalty," "offence," and "offender," are frequently made use of in the statute. Therefore the order asked for (if granted) would be void.

*Judgment.*

MR. COMMISSIONER FONBLANQUE. The language of the statute is somewhat embarrassing. Sect. 44. declares that the emigrant may recover the value of his passage money paid and

(b) Reported by J. W. M. Fonblanque, Esq.  
(c) 15 & 16 Vict. c. 44.

of the costs of his subsistence, and "such further sum not exceeding 10*l.* in respect of each such passage, as on the complaint, shall be a reasonable compensation for the loss or inconvenience occasioned to each such passenger by the loss of such passage." Now, in the section (a) which provides the mode of enforcing the recovery of any sum which a passenger may have been declared entitled to receive, the words "all penalties and sums of money by this Act made recoverable," are used. But I think that any apparent discrepancy between these two sections is cleared away by the language "in a later portion of the last-mentioned section; for there it is declared that the penalty for a breach of the former enactment shall be imprisonment "for any term not exceeding three calendar months, *unless such moneys and costs be sooner paid and satisfied.* Whence it seems that the intention of the statute, though somewhat obscurely expressed, was that the sums to be recovered by the passenger were to be by way of debt proveable here, and not as penalties. I therefore think that the bankrupt was improperly arrested, and must be discharged; but under the peculiar circumstances of the case I will make the discharge conditional on his giving an undertaking not to bring any action against the parties by whom he was arrested. (b)

(a) Sect. 73.

(b) The bankrupt gave the undertaking and the order was made; but the keeper of the prison refused to obey the above order, alleging that he was advised that this Court had no jurisdiction to order the release. Upon a further application, his Honour was pleased to order that the keeper should appear before him on a future day, to show cause why he should not be committed for con-

tempt in disobeying the order, his honour observing that it was most improper for officers of prisons to constitute themselves judges of law. In the meantime the matter was brought before Pollock C. B., on *habeas corpus*, and his Lordship was pleased to concur with the Commissioner in his views as to the construction of the statute, and to discharge the bankrupt from custody.

### RE EDWARD LIDBETTER. (c)

Before MR. COMMISSIONER MURPHY.

THE insolvent, who described himself as out of business, appeared to be heard.

Mr. Reed said he opposed on behalf of the detaining creditor; but the insolvent objected to his appearance on the ground that the attorney from whom he received his instructions, had received no authority from the creditor to oppose. The attorney

(c) Reported by E. H. Reed, Esq.

with his client, to oppose the plaintiff on his hearing under 1 & 2 Vict. c. 110.

1854.

EX PARTE  
NEWCOMBE,  
RE GRIFFITHS  
AND  
NEWCOMBE.

Judgment.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Sept. 11.

General instructions to an attorney to defend an action, and to proceed against the plaintiff as far as the law will allow, do not authorize him, without further communication

1854.

RE EDWARD  
LIDBETTER.*Argument.*

was called, and admitted that he had received no specific instructions from his client to oppose; but he had been directed by the detaining creditor, against whom the insolvent had brought an action, to proceed against him as far as the law would allow; on that authority the insolvent had been arrested, and instructions to oppose had been delivered to counsel.

*Judgment.*

MR. COMMISSIONER MURPHY said he should not admit the opposition in the absence of any instructions from the creditor to oppose. The general authority was given at a period when an action was pending between the insolvent and his detaining creditor; and as it was necessary that an insolvent should give a specific retainer to an attorney to conduct his proceedings in this Court, so in the case of an opposition it was equally necessary that specific instructions to oppose should be given.

Attorneys: *Silvester; Cooper.*

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Sept. 19.

Where an insolvent had described himself in an agreement with his opposing creditor as a "surveyor," and it appeared in evidence that beyond one transaction for a relation, he had never been engaged in that capacity, and had never held himself out to the world as such, — *Held*, that his description as an "auctioneer and appraiser" was sufficient.

*Argument.*

## RE MICHAEL HENRY MYERS. (a)

Before MR. COMMISSIONER MURPHY.

IN 1852, the insolvent had entered into an agreement with one Solomans to proceed to Australia, and to dispose of goods under certain conditions. In 1853, Solomans being declared a bankrupt, the insolvent was sued on the agreement by his assignees and a verdict was returned against him for 1200*l*. He had described himself in the agreement as of "45. Herbert Street, New North Road, Surveyor." But his description to the Court only mentioned the business of an auctioneer and appraiser. He swore, however, he had never been engaged as a surveyor but on one occasion for a relation, that he had contracted no debts in that character, and that he had never held himself out as such to the world.

Mr. *Sargood* urged the description was insufficient. The agreement was conclusive, the insolvent there had deliberately declared himself a surveyor, and he was bound now to describe himself accordingly.

Mr. *Nicholls* contended the description was sufficient; the only transaction in which the insolvent had been engaged as a surveyor, was of a private nature, and for a relation; he had never publicly held himself out to the world in that character, and there were no debts in the schedule contracted by him as a surveyor. The transaction was a solitary one, and *Re Baker* (b)

(a) Reported by E. H. Reed, Esq.

(b) 1 Bank. &amp; Insolv. Rep. 273.



was in point; in that case the insolvent had described himself in a bill of Exchange to his opposing creditor as Baker and Son; the son had no interest in the business, and the insolvent had omitted that description from his schedule. The *Chief Commissioner* held the description sufficient, observing, the transaction was a solitary one.

1854.  
RE MICHAEL  
HENRY  
MYERS.  
*Argument.*

**MR. COMMISSIONER MURPHY.** The Act requires that the schedule shall contain a full and fair description of a prisoner, as to his name or names, trade or trades, profession or professions; it does not appear that the insolvent ever publicly announced himself as a surveyor, or that he ever contracted a debt in that capacity, although the amount due to the opposing creditor springs out of an agreement, in which he has used the description of a surveyor. The transaction is a solitary one, and I think the description sufficient.

*Judgment.*

Attorneys: *Lewis & Lewis.*

## EXPARTE BATES, IN RE MEADOWS. (a)

Before **MR. COMMISSIONER EVANS.**

COURT OF  
BANKRUPTCY.  
Oct. 30.

**THIS** was a meeting for the choice of assignees. The bankrupt, who was a shopkeeper at Warboys, Hunts, on the 28th of August last, executed a deed of assignment of all his personal estate and effects to three trustees, viz., Samuel Bates, Matthew Wasdale, and Thomas Knight, for realisation and division equally amongst all his creditors. The trustees respectively executed the deed of assignment, and acted under it by realising a portion of the property to the amount of about 300*l.*, which was paid into a local bank in the joint names of the trustees. Mr. Pawson, a London creditor, who had not executed the assignment, filed a petition for adjudication in bankruptcy, under which Meadows was duly declared a bankrupt on the 13th of October, the act of bankruptcy being the deed of assignment of the 28th of August 1854.

The trustees under an assignment for benefit of creditors, which assignment is declared to be an act of bankruptcy, are not holding security, and may prove their debt under the bankruptcy, notwithstanding the assignment.

Mr. Samuel Bates, one of the trustees above named, now tendered a proof for 394*l.* 4*s.* 4*d.*, for goods sold and delivered to the bankrupt, anterior to the date of the deed of assignment.

The Commissioner will not interfere with the choice of the major part in value of the creditors, unless they choose an improper person; but a trustee who has to account to the bankrupt's estate is

Mr. *Jones*, solicitor for the petitioning creditor, objected to

(a) Reported by J. W. M. Fonblanque, Esq.

not a proper person to be appointed assignee, and if objected to such appointment will not be sanctioned by the Commissioner.

1854.  
 EXPARTE  
 BATES,  
 IN RE  
 MEADOWS.  
*Argument.*

the admission of Mr. Bates's proof. The creditor now seeking to prove had the security of an assignment of all the bankrupt's personal property, and moreover, he was in possession of a part of the bankrupt's estate which had been realised.

Mr. *Bagley*, for Bates. The assignment of the 28th of August is void, and the creditor abandons all claim under it. He is, therefore, a creditor without security. As to the estate realised by the trustees, it is deposited in a bank, ready to be handed to the official assignee, and Mr. Bates claims no special interest in it.

*Judgment.*

MR. COMMISSIONER EVANS. I am of opinion that Mr. Bates is entitled to prove. He can take no benefit under the assignment which is void as an act of bankruptcy. As to the money standing in the name of trustees, they do not hold it as security for their own debts, but for distribution amongst all the creditors of the bankrupt. The proof must be admitted.

The major part in value of the creditors who had proved, having voted for Mr. Bates, and Mr. Ulph, a creditor who had also executed the deed of assignment, as assignees.

Mr. *Jones* objected to the appointment of the assignees. Mr. Bates, one of the assignees, had been dealing with the property of the bankrupt as trustee, and was an unfit person to be an assignee, and the other trustee was also a party to the assignment.

MR. COMMISSIONER EVANS. I cannot sanction the appointment of any of the trustees as assignees; it is objectionable upon principle.

Mr. *Bagley*. Mr. Bates was selected by the majority of the creditors to act as trustee on their behalf; he has performed that duty so much to their satisfaction, that they are now desirous to have his services as assignee under the bankruptcy. It is hard upon the creditors if they are to be deprived of the services of the person upon whom they most rely, and whose respectability and fitness is unquestioned. It is not proposed that Mr. Bates shall be sole assignee; he is associated with another creditor, and with the official assignee, who would take care that he accounted fully to the estate.

MR. COMMISSIONER EVANS. I have no doubt the trustee in this case is a respectable person; but having property of the bankrupt's under his control, he is an accounting party to the estate. If he were appointed assignee, he would have to account to himself. This is clearly objectionable.

Mr. *Jones* suggested that the petitioning creditor, Mr. Pawson, should be associated as assignee with one of the other

creditors. The London creditors were all anxious for Mr. Pawson's appointment.

Mr. *Bagley*. The country creditors are the major part in value; and though they know Mr. Pawson to be at the head of a large establishment as a warehouseman in London, they prefer a creditor residing in the country.

MR. COMMISSIONER EVANS. I shall not interfere with the choice of the major part of the creditors, unless they elect an improper person.

Mr. Ulph was finally chosen sole creditors' assignee.

Solicitors: *Alfred Jones*; and *Newborn & Jarvis*.

1854.  
EXPARTE  
BATES,  
IN RE  
MEADOWS.

RE CHARLES TURNER. (a)  
Before MR. COMMISSIONER MURPHY.

IN May 1852 the insolvent had purchased the lease of premises 18. Seymour Crescent, Euston Square. In May 1853 he advertized the house to let by placing a bill to that effect in the window. During the same month, the detaining creditor having inspected the premises, and being informed by the insolvent that he quitted them to go into business at Islington, agreed to purchase the lease at 100*l.*, and a future day was named for the completion of the bargain, the insolvent promising to procure the attendance of the lessor to witness the transaction. On the 26th of May an assignment of the lease was executed, and the 100*l.* paid, but the lessor did not attend; and his absence was accounted for by an untrue statement. It appeared he had never been invited, and was wholly unaware of the insolvent's proceeding. The opposing creditor did not engage an attorney in the transaction, but a person who was introduced by the insolvent prepared and conducted the assignment. Shortly after the opposing creditor had removed his furniture to the premises, he was ejected therefrom by the sheriff. It was then discovered that antecedently to the sale, and before negotiations had been entered upon between the parties, an action of ejectment had been pending against the insolvent at the suit of the lessor. The insolvent had consulted his solicitor on the subject, who advised him to defend the action, but he had declined to do so, as he alleged, on the advice of his neighbours, and judgment, a day or two after the sale, went by default. Shortly

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
Sept. 18.

Where an insolvent had sold to his opposing creditor the lease of premises, concealing from him the fact that an action of ejectment was then pending against him by the lessor, and the opposing creditor was subsequently ejected from the premises in consequence, on action brought by the opposing creditor to recover damages for the fraud, judgment was allowed to go by default, and damages were assessed at 130*l.*, which constituted the opposing creditor's debt. Held, that the debt was within the meaning of the 78th sect. of 1 & 2 Vict.

(a) Reported by E. H. Reed, Esq.

c. 110., as a debt contracted by fraud and false pretences, and the insolvent was remanded accordingly.

1854.  
RE CHARLES  
TURNER.  
*Statement.*

after leaving the premises he had converted the whole of his furniture and effects into cash, and upon the proceeds and the 100*l.* he had lived up to the period of his arrest. From May 1853 to February 1854 the opposing creditor had been unable to discover the insolvent, but in the latter month service of a writ was effected, and an action commenced. The material counts of the declaration averred "for that the defendant, on the 26th day of May, in, &c., assigned to the plaintiff a piece or parcel of ground, together with a brick messuage or tenement erected or built thereon, and being, &c., to hold to the plaintiff for the residue then unexpired of a term of eighty-six years and three quarters of another year, wanting thirty days, from the 26th day of December 1823, granted, &c., subject to the rents, covenants, and conditions, &c. And the defendant, by the said deed, covenanted with the plaintiff that he the defendant, had done no act whereby the premises thereby assigned, or intended so to be, were, was, or should or might be prejudicially incumbered or affected. And that the defendant then had in himself good right, full power, and lawful and absolute authority by the said deed to assign or otherwise assure the said premises thereby assured or intended so to be with their appurtenances unto the plaintiff his executors, administrators, and assigns, for all the residue then unexpired of the said term of eighty-six years and three quarters of another year, wanting thirty days, in manner therein aforesaid, and according to the true intent of the said deed. Yet the defendant, before and at the time of making the said deed, had done an act whereby the said premises had been and then were prejudicially incumbered and affected, in this (to wit), that he had used and followed, and permitted others to use and follow, the trade and business of a bagnio-keeper and other offensive and obnoxious trades and businesses in and upon the said demised premises, without the license in writing of the lessor, his executors, administrators, and assigns, which was contrary to the said indenture of lease, and whereby the same had become and was, according to and by virtue of a condition therein contained, forfeited. And the defendant had not, at the time of making the said deed of assignment, any right, power, or authority by the said deed to assign or otherwise assure the said premises, with their appurtenances, or any part thereof, to the plaintiff for the residue then unexpired of the said term, whereby the plaintiff was, after the execution of the said assignment, ejected from the said premises by the lessor thereof, and lost the said term of years, and the moneys which he had paid for the said assignment.

The second count averred, for that the defendant, by falsely

and fraudulently representing to the plaintiff that he was entitled to a house, No. 18. Seymour Crescent, Euston Square, for the residue of a term of years, and by falsely and fraudulently concealing from the plaintiff that an action of ejectment was pending against him, the defendant, for the recovery of the said house, sold and assigned the said house for the said term of years to the plaintiff, and induced the plaintiff to purchase and pay a sum of money for the same. Yet the defendant was not then entitled to the said house and premises for the said term of years, or for any part thereof, but was a trespasser therein, and an action of ejectment was then pending against the defendant for the recovery of the said house and premises; and soon after the said purchase and payment, judgment was recovered in the said action of ejectment, and the plaintiff was ejected from the said house and premises under an execution issued on the said judgment.

Damages were laid at 200*l*. The insolvent not appearing to the action, judgment was obtained by default, and damages were assessed at 130*l*., for which sum execution was issued, and the insolvent taken.

Mr. *Reed*, having called the attention of the Court to the above facts, asked for a remand under the 78th section 1 & 2 Vict. c. 110. for contracting the debt by fraud and false pretences.

Mr. *Sargood*, for the insolvent, urged that inasmuch as the Act of Parliament referred only to frauds committed in the contracting of debts, and as no debt existed to the opposing creditor previous to the assessment of damages by the jury, the opposition could not be maintained.

MR. COMMISSIONER MURPHY said he had always regretted the case of *Re Moorhouse* (a), in which such a doctrine was upheld, and he could not help believing the intention of the Legislature was to embrace such a case as the present within the meaning of the 78th section. He did not know what the facts of the case in *Re Moorhouse* were, but to make it a parallel case to the present, he must suppose that instead of delivering wine of an inferior quality, the insolvent had, by selling it to some other party, disqualified himself from delivering it, and took the plaintiff's money with a knowledge that he could not deliver it. In such a case the judgment would not constitute the debt, but merely be evidence of it. The insolvent, by the assignment, had covenanted that he had done no act whereby the premises were prejudicially affected; he had covenanted that he had full

1854.

RE CHARLES  
TURNER.

Statement.

Argument.

Judgment.

(a) Cook's Practice, p. 209.

1854.

R<sup>B</sup> CHARLES  
TURNER.*Judgment.*

power and lawful authority to assign, yet he well knew at that very moment the lease had become forfeited, as charged in the declaration. How, otherwise, was the judgment by default to be accounted for? The insolvent had urged no reason, and his counsel had suggested no excuse. It was also admitted, for there had been no denial of the allegations in the second count, that he did falsely and fraudulently represent that he was entitled to a house for a term of years, when he had no such interest. It was admitted that he did falsely and fraudulently conceal that an action of ejectment was pending against him for the recovery of the house; and it could not be forgotten he had declined to defend the action of ejectment, although advised to do so by the gentleman he had consulted. There was no defence to the action of the opposing creditor when brought; there is no answer to his evidence to-day. He had parted with his money upon the faith of the representations made to him, and through the fraud and concealment of the insolvent, and the debt which was now owing was the immediate result of deliberate dishonesty.

Remanded twelve months from the date of the vesting order, for contracting a debt by means of false pretences.

Attorneys: *Humphreys*; and *Rushbury*.

# INDEX

TO

## PRINCIPAL MATTERS.

### ABSENTING.

#### ABSENTING FROM PLACE OF BUSINESS.

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#### ACT OF BANKRUPTCY.

1. A trader, on the 20th of December 1851, assigned to some of his creditors all his debts, bills of exchange, promissory notes, and other securities, and all books of account in which such debts or sums were entered, as a security for their debt; and at the same time, although not personally known by the trader, writs on two judgments, obtained some time previously, were in the hands of the sheriff, who, on the 22nd of December, levied execution on the trader's stock-in-trade and furniture. On the 24th of December the trader was adjudged bankrupt, on a petition presented on the 23rd.—*Held*, that the assignment was void as against the assignees under the bankruptcy. *Ex parte Bailey, In re Barrell* (Lords JJ.), 48.

2. C. assigned all his estate and effects to H., in consideration of H. having previously become surety for him for 100*l*., and also of a present advance of 55*l*. The deed contained a proviso, permitting C. to retain possession of the property until default by him in paying the 100*l*. when due, and the 55*l*. when required. No default was made up to the time of the bankruptcy of C., and the property was in the possession of C. at the time of the bankruptcy, and was sold by the assignees by consent of H., he submitting his right to the same to the judgment of the Court.—*Held*, that the assignment was an act of bankruptcy, and that the proceeds of the sale passed to the assignees of H. *Ex parte Harvey, Re Collins* (Goulburn, Com.), 194.

3. H., by deed, assigned all his shop and dwelling-house, stock-in-trade, &c., and property at

### ADJUDICATION.

W. or elsewhere, in consideration of an old debt and a present advance, subject to a proviso for redemption. The mortgagee ultimately took possession, and proceeded to sell. A few days before possession was taken, H. departed from his house, but left his address behind, and promised to return on a certain day. He did return for a few hours, but disappointed a creditor he had promised to pay.—*Held*, that the deed and departure were both acts of bankruptcy. *Re Holloway* (Goulburn, Com.), 244.

4. Bill of sale by a lodging-house keeper of all her household furniture in consideration of a bygone debt, secured by a promissory note.—*Held*, void as an act of bankruptcy after possession taken and sale prior to the adjudication. *Re Louisa Smith* (Fane, Com.), 264.

### ADJUDICATION.

See *Annulling Adjudication*.

Insolvent out of Custody. See *Jurisdiction in Insolvency*.

Sufficiency of Affidavit of Debt may be disputed at the Time of showing Cause against. See *Trader Debtor Summons*, 5.

1. The 104th section of the 12 & 13 Vict. c. 106. provides, that before notice of any adjudication of bankruptcy shall be given in the *London Gazette*, and at or before the time of putting in execution any warrant of seizure which shall have been granted upon such adjudication, a duplicate of such adjudication shall be served on the person adjudged bankrupt, personally, or by leaving the same at the usual or last known place of abode or place of business of such person; and such person shall be allowed seven days, or such extended time not exceeding four-

teen days in the whole, as the Court shall think fit, from the service of such duplicate, to show cause to the Court against the validity of such adjudication, &c. Where, therefore, a bankrupt does not show cause against the validity of the adjudication before the Commissioner within the period prescribed by this section, the Commissioner, after that period, has not any authority to entertain an application to review the adjudication under that, or under the 233rd section, and that a petition to annul the adjudication afterwards presented to the Commissioner by the bankrupt, was not such a "proceeding" as was contemplated by the Legislature in the 233rd section of the statute. *Carter v. Dimmock* (H. of L.), 12.

2. A petition to annul the adjudication on the ground of the infancy of the bankrupt will be dismissed, unless presented within the time prescribed by the 233rd section of statute 12 & 13 Vict. c. 106. *Ex parte West, Re West* (Holroyd, Com.), 20.

3. Where a person who has been adjudicated bankrupt does not show cause against the validity of the adjudication before the Commissioner within the period prescribed by section 104. of statute 12 & 13 Vict. c. 106., "or commence an action, suit, or other proceeding to dispute or annul the fiat," &c. within the period prescribed by section 233. of the same statute, the Court will not annul the adjudication on a petition of the bankrupt, notwithstanding it appears that at the time of such adjudication the bankrupt was a minor under twenty years of age. *Ex parte West, Re West* (L. C.), 58.

Where a person who has been adjudicated bankrupt does not show cause against the validity of the adjudication before the Commissioner within the period prescribed by section 104., a petition to annul such adjudication may be presented within the period prescribed by section 233.; but such last-mentioned petition should be presented to the Lord Chancellor, and not to the Commissioner. *Ib.*

4. The notice to dispute an adjudication must specify distinctly the grounds upon which it is intended to proceed; and it is not sufficient in such notice to state generally the bankrupt's intention to show cause, &c., notwithstanding he intends to dispute the adjudication on every point. *Ex parte Harding, Re Harding* (Goulburn, Com.), 151.

Where the notice to show cause against the adjudication on the part of the bankrupt was served within the seven days allowed by the 104th section of the Bankrupt Law Consolidation Act, and on the day appointed for the hearing the case went off upon a technical objection to the form of the notice, — *Held*, on the authority of *Castelli's Case*, (1 De G. M. & G. 437.) that the bankrupt was in time within the meaning of this section; and, on application, the time for showing cause was enlarged, to allow the bankrupt to amend his notice. *Ib.*

5. The Court will not annul an adjudication, or order the advertisement in the *Gazette* to be stayed on the mere ground of an arrangement having been entered into with the creditors, subsequent to such adjudication. *Re John James* (Holroyd, Com.), 154.

6. Where an insolvent has been discharged out of custody by his detaining creditor, the

## ANNULLING ADJUDICATION.

Court has no power to adjudicate. *Re William Jeffries* (Murphy, Com.), 191.

### ADMISSION OF DEBT.

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### ADVERTISEMENT.

Mere Arrangement with Creditors no Ground for staying. See *Adjudication*, 5.

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See *Trader Debtor Summons*, 2, 3. 5.

### AFTER-ACQUIRED PROPERTY.

See *Assignees*, 4.

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1. The bankrupt's estate being sufficient to pay 20s. in the pound, he is entitled to an allowance of 10l. per cent. under the 195th section of the Bankrupt Law Consolidation Act. *Ex parte Marriott, In re Marriott* (Evans, Com.), 155.

2. *Semble*, where a clear case of fraud is made against an insolvent, and he is remanded in consequence, the Court will refuse a rule nisi on the detaining creditors for an allowance under section 86. of 1 & 2 Vict. c. 110. *Re A. N. Luke* (Law, Com.), 216.

### AMENDMENT.

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## ANNULLING ADJUDICATION.

Mere Arrangement with Creditors, no Ground for. See *Adjudication*, 5.

1. Fraud, if clearly proved, is a sufficient ground for annulling an adjudication in bankruptcy; but mere concert is insufficient since the passing of the late Act. *Ex parte Adams, In re Westbrook, Ex parte Adams, In re Kirk* (Goulburn, Com.), 127.

So also, absence of assets is not *per se* sufficient. *Ib.*

Where the bankrupt was described, in the petition for adjudication, as of two places, in neither of which he carried on the business alleged, and the place where he did carry on business was not adverted to, and it did not appear that any one had been misled, or that the misdescription was made with any fraudulent intent. — *Held*, a sufficient description within the 89th section of 12 & 13 Vict. c. 106. *Ib.*

The bankrupt had opened a lairage for cattle, and had sold hay to the drovers using the lairage with a view to profit, first on his own account, and afterwards in connection with others, as a company, in their endeavours to establish a market, but in which they failed. — *Held* to be a trading as a hay dealer within the operation of the bankrupt laws. *Ib.*

Where, in a petition to annul, fraud and collusion are charged, and the charge is wholly unsupported by affidavit, and not substantiated by the evidence, and the adjudication is upheld, the petitioner will be ordered to pay the costs. *Ib.*



## ASSETS.

2. A mortgagee of chattels belonging to a bankrupt, which had been sold by the assignees as being in the reputed ownership of the bankrupt, applied to annul the adjudication, the time having elapsed after which the bankrupt himself could not apply for that purpose, and the Commissioner granted the application, on the ground that the bankrupt was not a trader within the meaning of the Bankrupt Law. The Court of Appeal, being satisfied on the evidence that the application to annul was made at the instigation and for the benefit of the bankrupt, reversed the decision of the Commissioner, and restored the adjudication, without deciding whether the bankrupt was or was not a trader. *Ex parte Emery, Re Bradbury* (Lords JJ.), 265.

## ASSETS.

Absence of, not *per se* sufficient Ground for annulling Adjudication. See *Annuling Adjudication*, 1.

Marshalling. See *Jurisdiction in Bankruptcy*, 1.

## ASSIGNEES.

See *Official Assignee; Provisional Assignee*.

Choice of accounting Party improper. See *Proof of Debts*, 13.

Power of Court to order Provisional Assignee to join in Conveyance. See *Jurisdiction in Insolvency*, 3.

1. Where an application is made to the Court for the Relief of Insolvent Debtors to appoint an assignee in a case which has been heard in a County Court, it must be accompanied by a certificate from the Judge that no similar application has been made to him by the person nominated, and been refused. *Re Joseph Davis* (Phillips, Com.), 36.

2. Assignees in bankruptcy are entitled to all such fixtures, set up for purposes of trade, as come within the principle of *Hellawell v. Eastwood*, 6 Exch. Rep. 295., and which the trader might remove. Stock-in-trade in the possession of the bankrupt at the time of the bankruptcy passes to the assignees. *Ex parte Humphreys, Re Gibbs* (Fane, Com.), 68.

3. A creditor sought, by bill in equity, to establish a title by equitable assignment, as was contended, to moneys belonging to the bankrupt in the hands of a third party. The bill was dismissed without costs; but the costs of the assignees, who were made defendants, were ordered to be paid out of the bankrupt's estate. He afterwards proved for the debt.—*Held*, that the costs of the assignees should, on a deficiency of assets in their hands, be deducted out of the dividend coming to the creditor in the first instance. *Ex parte The National Provincial Bank of England, In re T. Burton* (Fonblanque, Com.), 81.

4. A second petition against an uncertificated bankrupt is not absolutely void at law. *Ex parte The Assignees of Parkes, In re Parkes* (Holroyd, Com.), 113.

Where an uncertificated bankrupt has been suffered to trade without interruption or claim on the part of the assignees of the first bankruptcy, they are not entitled to any after-acquired

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property in the bankrupt's possession at the time of the second bankruptcy, as against the assignees under that bankruptcy. *Ib.*

And, *semble*, the ignorance of such trading on the part of the assignees of the first bankruptcy, without evidence of diligence or activity on their parts to enforce their rights, will not alter the case. *Ib.*

## ASSIGNMENT.

See *Act of Bankruptcy*, 2, 3.

Purchase by Creditors of Trustees under, made *bonâ fide*, protected. See *Deed of Trust*.

## ASSISTANT SCHOOLMASTER.

See *Servant*.

## ATTACHMENT.

How served. See *Contempt of Court*.

Who may apply for. See *Ib.*

## ATTORNEY AND SOLICITOR.

See *Opposition*, 12.

Jurisdiction to order Payment of Costs of Petitioning out of Estate. See *Practice in Insolvency*, 3.

## AWARD.

Judgment not signed until after Notice of Act of Bankruptcy. See *Proof of Debts*, 10.

1. Where an insolvent is indebted in damages recovered against him in an action for trespass and false imprisonment, and the declaration shows a clear case for remand, the Court will refuse an application to admit to bail until the day of hearing. *Re Henry William Lindus* (Murphy, Com.), 150.

2. Where an insolvent omits to file his books, the Court will refuse a discharge on bail, under sect. 38, 1 & 2 Vict. c. 110. *Re Joseph Parry* (Law Com.), 254.

3. A discharge on bail being clearly given by sect. 38, of 1 & 2 Vict. c. 110, the Court will rather enlarge than curtail the privilege. Where, therefore, matters were shown in evidence against L., which the Court intimated would be taken into consideration in giving judgment, on application the bail was enlarged, and the insolvent discharged until his adjourned hearing. *Re D. M. Lyons* (Murphy, Com.), 268.

4. Where on any application on sureties the record in an action between the insolvent and his opposing creditor shows a clear case for remand, a discharge on bail will be refused; but where the record simply proves the existence of a debt, and other evidence is necessary to bring the case within the penal provisions of the Act, the Court will not go into further evidence, but will grant an insolvent the privilege of bail. *Re Frederick Weston* (Murphy Com.), 281.

## BENEFIT BUILDING SOCIETIES.

See *Priority*.

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## BILL OF SALE.

Pre-existing Debt. See *Act of Bankruptcy*, 2, 4.

## BOND.

Where Debtor deposes that upon the Merits he has a good Defence. See *Trader Debtor Summons*, 6.

## CERTIFICATE.

1. Certificate meeting adjourned for further consideration to a day certain.—*Held*, that a creditor who had proved his debt might, upon good cause shown, be let in to oppose at the adjourned meeting, notwithstanding he had not given the requisite notice of opposition until after the adjournment. *Ex parte the Assignees of Ferris, In re Mormon* (Goulburn, Com.), 45.

2. A trader adjudged bankrupt upon his own petition. It appearing that his estate was insufficient to pay 5s. in the pound after payment of all expenses, a condition was annexed to the certificate, charging all future acquired estate with the deficit. No proceedings to be taken in regard to such estate without leave of the Court. *Re Joseph Boys* (Fonblanque, Com.), 76.

3. Where, on the suspension of the certificate, protection has been refused to the bankrupt for six months, and he has kept out of the way to avoid an arrest, the Court will take this into consideration, and not discharge him at the expiration of the time limited. *Ex parte Miles, In re Miles* (Fonblanque, Com.), 111.

4. A trader is not justified in providing by a Judge's order for payment of a creditor, whose debt is not yet due, whereby his whole estate is liable to be swept away from his other creditors; notwithstanding the Judge's order is dated several months before his bankruptcy. *Re Barnett* (Evans, Com.), 118.

## CHOSE-IN ACTION.

Assignee of a Debt. See *Opposition*, 4.

## CLAIM.

Delay in Entering. See *Dividend*.

## CONCERT.

Mere Concert not sufficient Ground for Annulling Adjudication. See *Annulling Adjudication*, 1.

## CONDITION.

See *Certificate*, 2.

## CONTEMPT OF COURT.

See *Discharge*, 2.

W. having made a proposal of 80l. per annum, payable by quarterly instalments of 20l., for the benefit of creditors, which was embodied in his final order,—*Held*, that the nonpayment of such instalments, pursuant to the terms of the final order, is a contempt of Court, for which the insolvent may be committed.—*Held*, also, that any creditor of an insolvent is entitled to make the application for the attachment. Lastly, that it is not a necessary preliminary to the

## DEPOSIT.

granting of the attachment that there should be a personal service on the insolvent, and a demand made to perform the act for which it is sought to commit him. *Re William Weymouth* (Law, Com.), 7.

## CONTRACT.

For Sale of Mining Shares uncompleted. See *Order and Disposition*, 5.

## CONTRACTING DEBT WITHOUT PROBABLE CAUSE.

Plaintiff in unfounded Action. See *Opposition*, 3.

## CONVEYANCE.

Power of Court to order Provisional Assignee to join in. See *Jurisdiction in Insolvency*, 3.

## COSTS.

See *Assignees*, 3.

How allowed. See *Practice in Insolvency*, 4.

Jurisdiction of Registrar to tax. See *Jurisdiction in Bankruptcy*, 2.

Jurisdiction to order Payment of Costs of petitioning out of Estate. See *Insolvency and Insolvent*, 3.

## COUNTY COURTS.

Certificate of Judge, in Cases heard in. See *Assignees*, 1.

## CREDITORS.

Heard in Absence of Insolvent, where he fails to appear. See *Practice in Insolvency*, 5.

How Costs of, allowed, where Opposition results in bringing Money into Court. See *Practice in Insolvency*, 4.

Trustee under void Deed not a Creditor holding Security. See *Proof of Debts*, 13.

## DEED OF TRUST.

Act of bankruptcy by conveyance (by way of assignment for benefit of creditors) of all the trader's estate on the 8th of March, adjudication on the 10th; between the 8th and 10th, Messrs. D., creditors of the bankrupt, obtained goods, which they applied in part payment of their debt. On the application of the assignees (who were also trustees under the assignment) to have the value of the goods repaid to the estate by Messrs. D.,—*Held*, that at the time of the delivery of the goods to Messrs. D. the bankrupt was the agent of the trustees, and that the transaction between Messrs. D. and the bankrupt was *bond fide*, and protected under 12 & 13 Vict. c. 106. s. 133. *Ex parte Assignees of Quick, Re Quick* (Fane, Com.), 277.

## DELAY.

In entering Claim. See *Dividend*.

## DEPOSIT.

Of Purchase Money in hands of Auctioneer. See *Vendor and Purchaser*.

## DESCRIPTION.

### DESCRIPTION.

See *Petition*, 11.

See *Schedule*, 1, 2, 5, 6.

Interruption of Residence. See *Petition in Insolvency*, 6.

Omission of Trading carried on. See *Petition in Insolvency*, 9.

### DISCHARGE.

Arrest of Bankrupt pending Suspension of Certificate. See *Protection*, 4.

Committal by County Court Judge after Interim Order. See *Protection*, 3.

Committal by Order of County Court Judge. See *Jurisdiction in Insolvency*, 5.

Right to, not prejudiced by not defending Action after final Order. See *Final Order*.

1. Where an insolvent carries on a business which is capable of being sold, the Court will withhold the discharge until he has placed the assignee in a position to dispose of it for the benefit of creditors. *Re William Patterson* (Philips, Com.), 39.

2. The Court of Bankruptcy will not interfere, or order the discharge out of custody, of a bankrupt, who, being a prisoner for debt, has incurred a contempt of the Insolvent Debtors' Court, for neglecting to file his schedule in that Court, on the ground that his remaining in custody is entirely of his own seeking. *Ex parte Oliver*, *Re Oliver* (Holroyd, Com.), 164.

### DISCRETION OF COURT.

R. having voluntarily surrendered to the provisional assignee 418*l.* 19*s.* 3*d.*, to which he had been entitled as next of kin, twenty years after his insolvency, it was ordered, on application, that the sum of 30*l.*, which had been deducted from his pension annually, for the benefit of his creditors, should be discontinued. *Re Samuel Frederic Ray* (Law, Com.), 5.

### DIVIDEND.

Where an alleged creditor has, without any good reason, neglected to come in under the bankruptcy for eighteen months, and until the estate has been nearly wound up, he will not be allowed to enter a claim, with a view of staying a dividend. *Ex parte Price*, *In re Williams and Marchant* (Fane, Com.), 73.

### DOMESTIC SERVANT.

See *Schedule*, 2.

### DOUBLE PROOF.

See *Proof of Debts*, 6.

### ELECTION.

See *Mortgagor and Mortgagee*, 2.

### EQUITABLE DEPOSIT.

See *Reputed Ownership*.

Of Title Deeds. See *Jurisdiction in Bankruptcy*, 1.

## FRAUD.

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### ESTREATING.

See *Recognizances*, 1, 2.

### EVIDENCE.

Where Record in an Action Evidence of vexatious Defence, and where not. See *Bail*, 4.

### EXPARTE APPLICATION.

See *Order and Disposition*, 3.

### FALSE STATEMENT.

See *Schedule*, 4.

### FICTITIOUS ARREST.

See *Jurisdiction in Insolvency*, 1.

### FINAL ORDER.

See *Opposition*, 8.

Sect. 28. [of 7 & 8 Vict. c. 96., enacts "That if no day be named for making the final order, or if the consideration of such final order be adjourned *sine die*, or if the final order be refused, the Commissioner shall have the power, after the expiration of such time, &c., to make an order to protect such petitioner from being taken or detained under any process whatever," &c. Sect. 29. provides "That if such petitioner shall be taken or detained under any process whatever for any debt or claim in respect of which he is protected from process by such order as last aforesaid, it shall be lawful for the Commissioner to order any officer who shall have such petitioner so in custody to discharge such petitioner therefrom." C., who had obtained his final order, being sued for a debt which was set out in his schedule, allowed judgment to go by default, and was taken in execution on a *ca. sa.*—*Held*, that the provisions of the latter section are applicable to a final order as well as an order for protection. Secondly, that a *ca. sa.* is process within the meaning of the section, from which the Court can order a discharge. Thirdly, that the insolvent's right to a discharge was not prejudiced by his failing to appear and plead the adjudication on being sued, and that he was therefore entitled to be discharged from custody. *Re John Coppins* (Law, Com.), 54.

### FIXED UTENSILS.

See *Mortgagor and Mortgagee*, 5.

### FIXTURES.

Rights of Assignees to. See *Assignees*, 2.

### FORFEITED SHARES.

How to be estimated. See *Proof of Debts*, 1.

## FRAUD.

If clearly proved, sufficient Ground for annulling Adjudication. See *Annulling Adjudication*, 1.

Sale of Lease pending Action of Ejectment. See *Opposition*, 13.

Where evident, Rule *Nisi* for Allowance not granted. See *Allowance*, 2.

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### FRAUDULENT PREFERENCE.

See *Act of Bankruptcy*, 1.

### FRIENDLY ARREST.

See *Petition in Insolvency*, 1, 2, 13, 16.

### GUARANTEE.

See *Proof of Debts*, 3.

### INSTALMENTS.

Nonpayment of, pursuant to Final Order. See *Contempt of Court*.

### INTEREST.

In the case of a surplus remaining after the creditors have received 20s. in the pound, they are entitled to be paid interest upon their several debts, as against a secret partner of the bankrupt, who has proved, but received no dividend under the bankruptcy. *Ex parte Holland, Re Holland* (Evans, Com.), 153.

### INTERIM ORDER.

Committal by County Court Judge. See *Protection*, 3.

### JOINT ESTATE.

See *Order and Disposition*, 2, 3.

Accommodation Bill accepted by One of Two Partners, with Consent of other Partner. See *Proof of Debts*, 5.

### JOINT STOCK COMPANY.

How Shares in, to be estimated. See *Proof of Debts*, 1.

### JURISDICTION IN BANKRUPTCY.

See *Petition in Bankruptcy*, 2.

1. *Of Court.* *Semble*, this Court has no jurisdiction to marshal assets, as between mortgagees, without the consent of all parties. *Ex parte Sir Edmund Lacon, Bart., Youell & Co., In re Colk* (Fane, Com.), 107.

A deposit of old title deeds, in which the name of the depositor is not mentioned in any way, for the purpose of giving a lien upon the estates comprised in such deeds, confers a good title, by way of equitable mortgage, as against the general creditors of the bankrupt. *Ib.*

2. *Of Registrar.* The solicitors of the assignees of a bankrupt had their bills of costs taxed in March 1851, by the Registrar of the District Court of Bankruptcy at Birmingham. The taxation was made *ex parte*, without notice to the assignees. In April 1853, the assignees and several of the creditors applied to the District Court for a re-taxation of the bills which had not been paid.—*Held*, (reversing the decision of the Commissioner) that such re-taxation ought to be ordered. Whether the Registrar of the District Court had jurisdiction to tax the bills, *quære*? *Ex parte Bateman, Re Burbury* (Lords JJ.), 235.

### JURISDICTION IN INSOLVENCY.

See *Recognizances*, 1, 2.

To make Order for Payment of Costs of Petitioning out of Estate. See *Practice in Insolvency*, 3.

## MORTGAGOR AND MORTGAGEE.

To stay Proceedings on tender of Debt and Costs. See *Vesting Order*.

1. Where the sum for which an insolvent arrested is partly fictitious, to raise the debt above 20*l.*, the Court has no jurisdiction, although a second creditor has lodged a detainer. *Re Robert Watts* (Law, Com.), 5.

2. Where an insolvent is out of custody on bail, until the day of hearing, and a discharge is lodged at the prison, in the interval, by the detaining creditor, the Court has no power to make an adjudication. *Re George Smith* (Murphy, Com.), 209.

3. The Court has no power to make an order on the provisional assignee to join in making a conveyance or assignment under section 68. of 1 & 2 Vict. c. 110., until after the day gazetted for the bringing up of the insolvent. *Re W. P. Carter* (Phillips, Com.), 212.

4. Where an insolvent resides within a parish the distance whereof, as measured by the nearest highway from the General Post Office in London to the parish church of such parish, exceeds twenty miles, this Court has no jurisdiction. *Re Richard Holden* (Murphy, Com.), 216.

5. Where an insolvent has been discharged under 1 & 2 Vict. c. 110., and is subsequently committed to prison by the order of a County Court Judge for the nonpayment of a debt which is set out in the schedule, this Court has no power to order a discharge. *Re W. H. Howe* (Murphy, Com.), 274.

### LIEN.

See *Mortgagor and Mortgagee*, 3, 4.

### MARSHALLING ASSETS.

See *Jurisdiction in Bankruptcy*, 1.

### MINING SHARES.

Contract uncompleted. See *Order and Disposition*, 5.

### MISDESCRIPTION.

See *Petition in Insolvency*.

### MISREPRESENTATION.

See *Proof of Debts*, 7.

### MISTAKE.

See *Petition in Insolvency*.

## MORTGAGOR AND MORTGAGEE.

Marshalling Assets. See *Jurisdiction in Bankruptcy*, 1.

1. A mortgagee is entitled, as against the assignees of a bankrupt, to the proceeds of a sale of mortgaged premises, into the possession of which he has entered several days prior to the bankruptcy. *Ex parte Allum, In re Kerlake* (Evans, Com.), 47.

2. A mortgagee agreed to accept a composition in respect of his mortgage debt, upon condition that if any instalment should be unpaid for ten days after it had become due, the mortgagee should be remitted to his original rights

and remedies. He proved under the bankruptcy for the amount remaining due upon the composition, no instalment being then in arrear.—*Held*, he had made his election to come in under the bankruptcy, and could not take advantage of the condition to increase his proof upon default subsequent to such proof. *Esparle Smith, In re Collier* (Evans, Com.), 61.

3. M., in consideration of money lent and advanced to W., by deed covenanted with W., that if default were made by him in payment, W. should be at liberty to enter and take possession of the premises and effects of M., and to sell the same, and apply the purchase money in payment of expenses, and of the debt due to him, and account to M. for the surplus. M. made default in payment; and W., by his agent, entered on and took possession of the premises and effects, but did not sell. A few days after W. had taken possession, &c. M. was adjudicated a bankrupt.—*Held*, that the premises and effects passed to the assignees. *Esparle Wayman, In re Mellor* (Evans, Com.), 213.

4. Previous to the adjudication, W. proceeded against T. for the recovery of a debt both at Law and in Bankruptcy by trader debtor summons simultaneously, and was requested by T. to withdraw the proceedings in Bankruptcy, T. promising to give security for payment of the debt out of the surplus which he expected would come to him out of certain property belonging to him, which he had mortgaged, and which was about to be sold. Arrangements were made for carrying this proposition into effect, but before they could be concluded, the time for paying and compounding under the 12 & 13 Vict. c. 106. s. 80. had elapsed, and T. filed a declaration of insolvency (12 & 13 Vict. c. 106. s. 70.), on which he was adjudicated a bankrupt. W. claimed a lien on the mortgaged property in respect of the agreement.—*Held*, that W. had notice that T. had committed an act of bankruptcy in respect of the trader debtor summons, and that the lien could not be sustained. *Esparle Weston, In re Taylor* (Fane, Com.), 240.

5. Mortgage for a term of years of a brewery, tap, malt lofts, and premises, together with plant, fixtures, and machinery, and assignment to mortgagee of plant, goods, utensils, implements, and things on or about the premises. Proviso for redemption on payment of the mortgage debt on a day certain, or at such earlier day as the mortgagee should appoint; and that until default, the mortgagor should retain possession of the premises, &c. The mortgagor remained in possession of the premises, &c. up to his bankruptcy.—*Held* (on submission to the jurisdiction) that certain plant and fixtures of a moveable nature passed to the assignees. *Esparle Langton, Re Clarkson*, (Fane, Com.), 241.

## MOVEABLE UTENSILS.

See *Mortgagor and Mortgagee*, 5.

## NOTICE.

See *Opposition*, 11.

Of equitable Deposit need not be in Writing. See *Reputed Ownership*.

To dispute Adjudication must specify distinct Grounds. See *Adjudication*, 4.

## OFFICIAL ASSIGNEES.

Section 160. of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106., empowers the Court to make an allowance "to such person as the Court shall think fit" for the preparation of the balance-sheet and accounts of a bankrupt.—*Held*, that the preparation of such balance-sheet and accounts by the official assignee was inconsistent with the duties of his office, and that sums allowed to him under the above section by the Commissioner for such preparation must be disallowed. *Esparle Russell, Re Minnitt* (Lords JJ.), 230.

## OPPOSITION.

See *Practice in Insolvency*, 6.

Consenting to a Judge's Order for Payment of a Debt not due. See *Certificate*, 4.

Where Notice given after Adjournment. See *Certificate*, 1.

1. Where an insolvent had vexatiously defended an action which had been brought against him by his opposing creditor,—*Held* to be no ground of complaint under the Protection Statutes. *Re J. Long* (Phillips, Com.), 75.

2. Where an insolvent gives an attorney a general authority to act for him, and he, without communicating with the insolvent, pleads to an action which has been brought against him, the Court will hold the insolvent responsible for the consequences. *Re G. H. Child* (Murphy, Com.), 101.

3. Where an insolvent is indebted for costs in consequence of having brought an unsuccessful action, and it appears to the Court that the claim made was known by him to be unfounded, he will be held to have contracted a debt by means of false pretences, within the meaning of sect. 78. of 1 & 2 Vict. c. 110. *Re Richard Dunn* (Law Com.), 119.

4. A., who had obtained a judgment against the insolvent for 4*Q.*, assigned it to B., empowering him in the name of A. to issue execution, proceed to outlawry, or otherwise, as should be necessary for the recovery of the debt. Subsequently A. was declared a bankrupt.—*Held*, that B. was entitled, in the name of A., to oppose the insolvent. *Re Harry Robert Sorrell* (Murphy, Com.), 182.

5. An insolvent who disposes of property within three months of the filing of his petition, has no *locus standi* under the protection statutes. *Re Richard Thorne* (Murphy, Com.), 185.

6. A vexatious defence to an action is not a ground of opposition to an insolvent under the protection statutes. *Re William Liddelow* (Phillips, Com.), 186.

7. A vexatious defence to an action, is a ground of opposition to an insolvent under the protection statutes. *Re W. J. John* (Murphy, Com.), 199.

8. Where an insolvent had inserted in her schedule as creditors the several persons whose names appeared to a bill of exchange of which she was the acceptor,—*Held*, that the holder only was entitled to oppose. *Held*, also, that his right to appear did not extend to a day appointed for the adjourned consideration of the final order, he not having appeared before. *Re M. A. Cann* (Murphy, Com.), 217.

9. Where a creditor endeavours to make terms for himself, and threatens an opposition if those terms are not complied with, the Court will not allow him to oppose. *Re William Penfold* (Murphy, Com.), 220.

10. An insolvent who is in custody for damages recovered in an action brought against himself and wife for slander committed by the wife is in custody within the meaning of the 78th section of 1 & 2 Vict. c. 110., and the plaintiff in such action is entitled to an adverse adjudication thereunder against such insolvent. *Re John Buckwell* (Law, Com.), 270.

11. Where a creditor fails to give notice of his opposition, according to the rules of Court, he will not be admitted to oppose. *Re James Giddings* (Phillips, Com.), 281.

12. General instructions to an attorney to defend an action, and to proceed against the plaintiff as far as the law will allow, do not authorize him, without further communication with his client, to oppose the plaintiff on his hearing under 1 & 2 Vict. c. 110. *Re Edward Lidbetter* (Murphy, Com.), 283.

13. Where an insolvent had sold to his opposing creditor the lease of premises, concealing from him the fact that an action of ejectment was then pending against him by the lessor, and the opposing creditor was subsequently ejected from the premises in consequence, on action brought by the opposing creditor to recover damages for the fraud, judgment was allowed to go by default, and damages were assessed at 130*l.*, which constituted the opposing creditor's debt. — *Held*, that the debt was within the meaning of the 78th sect. of 1 & 2 Vict. c. 110., as a debt contracted by fraud and false pretences, and the insolvent was remanded accordingly. *Re Charles Turner* (Murphy, Com.), 287.

14. Where there has been a contest before a jury, and a motion afterwards to the Court on a legal point, the Court is disinclined to pronounce a defence vexatious; but where the plaintiff, by such defence, has been put to a considerable expense, and it appears that the plea was founded in falsehood, the Court will adjudge the defence vexatious. *Re Stephen Couchman* (Law, Com.), 248.

## ORDER AND DISPOSITION.

See *Mortgagor and Mortgagee*, 3, 4.

Possession of Debtor until Default. See *Act of Bankruptcy*, 2.

1. Partnership property retained after dissolution by the continuing partner B., who afterwards became bankrupt. — *Held*, to be in the use, order, and disposition of B., notwithstanding he had not complied with the terms of an award to pay his share to the retiring partner. *Ex parte Brewster and West, In re Brewster* (Evans, Com.), 27.

2. A. and B., partners, dissolved partnership, and gave notice thereof in the *Gazette*, and, by circular, required the debts due to the firm to be paid to A., who afterwards became bankrupt. — *Held*, that these debts remained the property of the firm, although, as between the partners, it had been agreed that all the partnership assets should belong to A. *Ex parte The Assignees of Brewster and West, In re Brewster* (Lords JJ.), 62.

3. *Semble*, this Court ought not to make an

## PASSENGERS ACT.

order for sale under the 125th section of the Bankrupt Law Consolidation Act 1849, upon an *ex parte* application; and that the Court should not entertain an *ex parte* application for the order. *Ex parte The Assignees of Plimmer, In re Plimmer* (Holroyd, Com.), 83.

The bankrupt, being the assignee of the reversion of a sum of stock, in 1846 assigned to A., but no notice was given to the trustee of such assignment: the tenant for life died subsequent to the bankruptcy, which took place in March 1853. — *Held*, that the stock was goods and chattels within the meaning of the 125th section of the Act, and that, at the time of the bankruptcy, it was in the order and disposition of the bankrupt as reputed owner thereof, with the consent of the true owner, and consequently passed to his assignees. *Ib.*

4. Where an assignee of furniture, &c. under a bill of sale allowed the goods to remain in the possession of the bankrupt, until after a petition for adjudication had been filed in this Court, — *Held*, the assignees were entitled to an order to sell the same for the benefit of the creditors under sect. 125. of the Bankrupt Law Consolidation Act 1849, as being "in the order and disposition of the bankrupt, with the consent and permission of the true owner." *Ex parte The Assignees of Brock, In re Brock* (Fonblanque, Com.), 102.

5. Contract for the purchase of fifty shares in a mining company. Purchaser accepted bills of exchange for the amount of the purchase money. It ultimately turned out that the vendor only possessed nineteen shares. On the purchaser producing the transfer for fifty shares, the officer of the company refused to register on account of the discrepancy between the number of shares named in the transfer and the number standing in the company's books in the name of the vendor. The contract remained uncompleted at the time of the bankruptcy of the vendor. The purchaser satisfied the bills of exchange at maturity. — *Held*, that the nineteen shares were not in the order and disposition of the bankrupt. *Ex parte Rayner, In re Hommersham* (Goulburn, Com.), 256.

## ORDER FOR SALE.

*Ex parte* Application for. See *Order and Disposition*, 3.

## OUTLAW.

No one able to give Legal Discharge. See *Superseats*.

## PARTING WITH PROPERTY.

An insolvent who parts with property within three months of filing his petition, otherwise than for the necessary support of himself and family, and the necessary expenses of his petition, or in the ordinary course of trade, has no *locus standi* under the protection statutes. *Re John Tams* (Law, Com.), 41.

## PARTNERS AND PARTNERSHIP.

Property retained by continuing Partner after Dissolution. See *Order and Disposition*, 1, 2.

## PASSENGERS ACT.

Sums recoverable under. See *Proof of Debts*, 12.

PETITION IN BANKRUPTCY.

Time within which to contest validity of Adjudication. See *Adjudication*, 1, 2, 3.

1. Petitions for adjudication must be on parchment. *Anonymous* (Evans, Com.), 4.

2. Petition for arrangement dismissed, and order thereon annulled upon the application of the trader, the creditors consenting, although the case was not within the terms of the 223rd section of the 12 & 13 Vict. c. 106. *Esparte Phillips*, *In re Phillips* (Lords JJ.), 83.

PETITION IN INSOLVENCY.

See *Description*, 1, 2, 5, 6.

Debts owing under Bankruptcy. See *Protection*, 1.

Debts owing under former Insolvency. See *Id.* 2.

Transfer of Debts from one Schedule to another. See *Practice in Insolvency*, 1, 2.

1. It is not an inflexible rule that the petition of an insolvent will be dismissed, where the arrest is friendly, and there are no assets to be divided amongst the creditors. *Re William Jones* (Law, Com.), 3.

2. Where an insolvent comes before the Court on a friendly arrest, and there are no assets to be divided amongst creditors, the petition will be dismissed. *Re William Cult* (Phillips, Com.), 37.

3. In estimating the amount of a trader's debts, those due to mortgage creditors must be included. *Re J. G. Harmer* (Law, Com.), 40.

4. The Court will dismiss the petition where the arrest is friendly, and there are no assets to be divided amongst creditors. *Re Marcus Bain* (Law, Com.), 64.

5. Where an insolvent, a director of an abortive gold mining company, had been described in the prospectus, by mistake, as of "Sydenham," his real residence being Lacey Terrace, Newington, and where the offices of a friend had been used as an address for business and other letters. — *Held*, that he must describe himself as of both places, and must re-advertise. *Re W. Dunbar* (Murphy, Com.), 100.

6. W., who occupied lodgings without the jurisdiction of this Court, having left them for a fortnight during the six months immediately preceding the date of his petition to visit a daughter, who resided within the jurisdiction, petitioned, under sect. 8. of 10 & 11 Vict. c. 102., as a non-resident. — *Held*, that the visit to the daughter constituted no interruption of residence, and petition dismissed. *Re Stephen Williams* (Phillips, Com.), 148.

7. Where it appears to the Court that the allegations of the petition are untrue, it will be dismissed. *Re Richard Hutchinson* (Phillips, Com.), 181.

8. The acceptance of a smaller sum in satisfaction of a greater sum, constitutes no legal discharge of a debt; therefore, in estimating the amount of an insolvent's liabilities, the difference will be taken into consideration. *Re William Strange* (Phillips, Com.), 184.

9. Where an insolvent petitions the Court as a trader, but omits to describe himself as such in his petition, it will be dismissed. *Re Samuel Wray* (Phillips, Com.), 189.

10. Where an insolvent is a certificated bankrupt, in estimating the amount of his debts under the protection statutes, those owing at the time of the bankruptcy will not be included. *Re John Whitfield* (Murphy, Com.), 190.

11. An insolvent must describe himself as of all places where he has resided during the time when his debts were contracted. *Re J. B. Cash* (Law, Com.), 212.

12. The Court will not dismiss an insolvent's petition where an omission appears which is supplied by the schedule, unless fraud or collusion be intended. *Re Isaac Smith* (Murphy, Com.), 219.

13. Where the arrest is friendly, and there are no assets to be divided amongst creditors, the petition will be dismissed. *Re Timothy Stafford* (Phillips, Com.), 249.

14. Where an insolvent wilfully omits a debt from his schedule, the Court will dismiss the petition, although the creditor omitted does not desire to oppose. *Re Thomas Pain* (Phillips, Com.), 250.

15. Where an insolvent petitions the Court in a fictitious name, giving his real name as an *alias*, his petition will be dismissed. *Re G. M. Jaques* (Phillips, Com.), 251.

16. Where an insolvent is in an evident condition of embarrassment, and no case is proved against him, the Court will not dismiss the petition, although the arrest is friendly, and there are no assets to be divided amongst the creditors. *Re Thomas Fisher* (Murphy, Com.), 279.

PRACTICE IN INSOLVENCY.

See *Bail*, 3.

1. Where an insolvent petitions the Court under the protection statutes, and no final order is granted, the Court will not permit him to insert the debts in a subsequent petition under the prison statutes. *Re W. A. Holmes* (Law, Com.), 252.

2. B., whose petition under the Protection Act had been adjourned *sine die*, contracted fresh debts, and was arrested in consequence. — *Held*, that he was not entitled to insert in his new petition, under 1 & 2 Vict. c. 110., the debts he had scheduled under his former application. *Re Arthur Blyth* (Murphy, Com.), 253.

3. The Court has power, under sect. 10. of 7 & 8 Vict. c. 96., to make an order for the payment of the costs of petitioning out of an insolvent's estate. *Re P. J. James* (Murphy, Com.), 270.

4. Although the Court is not empowered under the protection statutes to give costs *ex nomine*, yet they will be allowed, under the head of expenses of getting in the estate, to creditors, whose opposition results in bringing money into Court. *Re William Booth* (Law, Com.), 272.

5. Although an insolvent fails to appear on the day appointed for his examination, the creditors are entitled to prove their cases, and to call witnesses. *Re Alfred Scholey* (Murphy, Com.), 273.

6. Where an insolvent applies to be discharged on bail until his adjourned hearing, the detaining creditor is entitled to oppose the application, although he did not appear on the occasion of the original hearing. *Re George Ruffell* (Murphy, Com.), 275.

## PRINCIPAL AND SURETY.

Release of original Debtor. See *Proof of Debts*, 9.

A father and son executed a joint and several promissory note, to secure a debt due from the son. Subsequently the son assigned all his property for the benefit of his creditors and obtained from them a release, but the deed contained no reservation on the part of the creditor of his right to recover from the father what the son's estate should be insufficient to pay. — *Held*, that the creditor, having released the son unconditionally, the father was released also. *Exparte Harvey, Re Blakeley* (Fane, Com.), 65.

## PRIORITY.

A defaulting treasurer of a benefit building society having become bankrupt, the trustees of the society claimed to be paid in full out of the estate the moneys due from him as such treasurer. *Exparte Bailey, Re Barrell* (Lords JJ.), 235.

Whether this claim could have been sustained under 4 & 5 Will. 4. c. 40. s. 12. and 6 & 7 Will. 4. c. 32. s. 4. before the passing of the Bankrupt Law Consolidation Act, *quære*. *Ib*.

*Held*, that any preference given by those sections was taken away by the Bankrupt Law Consolidation Act, and that the case turned upon section 167. of that Act. *Ib*.

*Held*, that this section does not apply to benefit building societies, and that the society had no priority over other creditors. *Ib*.

## PRIVILEGED DOCUMENTS.

Briefs which have been used at a trial, and returned to the client, are privileged as to the matters therein. *Exparte Allen, In re Columbine* (Goulburn, Com.), 43.

## PROCEEDS OF SALE.

See *Mortgagor and Mortgagee*, 1.

## PROOF OF DEBTS.

Executing Composition Deed, reserving Rights on Default. See *Mortgagor and Mortgagee*, 2.

1. The value of forfeited shares in a banking company is to be estimated at their market price at the time of forfeiture, or at that at which they were reissued, and not by the amount actually paid upon them in the company's books. *In re Lacy, Exparte the Commercial Bank of London* (Goulburn, Com.), 10.

2. N., who had described himself in his schedule as the lay impropriator of the tithes of the village of Lindfield, being insolvent and in prison, S., by the license of the bishop, undertook the duties of curate, which he continued to perform for nine years. On a claim being made by S. against the estate of N. for remuneration for his services for four years, part of the nine, at the rate of 30*l*. per annum, — *Held*, that as N. was the lay impropriator of the tithes, his estate was liable to S. for the amount claimed. *Re John Henry Nainby*. (Phillips, Com.), 24.

3. Words in a guarantee, "In consideration of, &c. I guarantee the payment by A. of any loss which may possibly accrue to you on your share of this transaction." — *Held*, that the liability of the party giving the guarantee terminated upon the sale of the goods at a profit, so

## PROOF OF DEBTS.

as not to include a loss occasioned by the misappropriation by A. of the proceeds of the sale. *Exparte De Souza, In re Lacy* (Goulburn, Com.), 30.

4. A party will not be allowed to prove against the estate and retain his securities. He must waive all right in respect of the latter or abandon his proof. *Exparte Price, In re Williams and Marchant* (Fane, Com.), 74.

5. F., the holder of an accommodation bill of exchange drawn by W. and accepted by B. with the knowledge of his partner C., and indorsed by W. over to F. for value. F. accepts a composition from W. in respect of this bill. B. and C. become bankrupt. — *Held*, the bill was not fraudulent as regarded C. — *Held*, also, that F. was entitled to prove against the joint estate of B. & C. for the amount, less the composition. *Exparte Frew, Re Black and Cope* (Fonblanque, Com.), 156.

6. Certain bills of exchange, purporting to be drawn at Stettin, were addressed to and accepted by H., a member of, and on account of, the firm of M. & Co., and indorsed by the bankrupt, also a member of the firm, to S., for value. On the bankruptcy of H., S. proved against his estate in respect of these bills. — *Held*, he was not entitled to prove upon the same bills as against the bankrupt's estate, notwithstanding he had no notice that the bankrupt was a member of the firm of M. & Co. *Exparte The Royal British Bank of Scotland, Re Ohell* (Fonblanque Com.), 160.

7. W., the continuing partner, on the faith of a statement made by P., the retiring partner, and really believed by P. at the time, viz., that A. owed 2500*l*. to the firm, covenanted to pay to P. 2000*l*. for the purchase of his interest in the partnership property. It afterwards appeared that, instead of A. being the debtor, the firm was indebted to him in about 700*l*., and also in a sum of 1319*l*. to P.

*Held*, on the bankruptcy of W., not such a misrepresentation as should induce the Court to reject the proof of P. for the whole amount. *Exparte Price, Re Williams and Marchant* (Goulburn and Holroyd, Comra.), 169.

*Held*, also, that a solvent partner may prove against the separate estate of his co-partner, a bankrupt, in the event of a surplus. *Ib*.

8. In an action of *assumpsit* on an account current, brought by T. against P., to which defendant pleaded (*inter alia*) payment and set-off, verdict, by consent, for plaintiff, subject to award: arbitrator to direct that a verdict might be entered up for either party, and make directions as to costs both of the suit and arbitration. After a lapse of six years, an award was made in favour of the plaintiff for 11,000*l*. odd. Four days after the award was made, and previous to judgment being signed and costs taxed, the defendant committed an act of bankruptcy, (of which the plaintiff had notice) by filing a declaration of insolvency. Judgment was signed a few days afterwards, and the defendant was ultimately adjudicated a bankrupt. — *Held*, that the plaintiff had a right to prove on the judgment entered up in pursuance of the award, notwithstanding his having notice of the prior act of bankruptcy. *Exparte Thornthwaite, In re Pickering* (Holroyd, Com.), 201.

On an application to expunge or reduce proof,



set-off in respect of lost documents, disallowed. *Id.*

9. A. and B. gave a joint and several promissory note to C., A. being principal, and B. surety. A. afterwards executed a deed of assignment for the benefit of his creditors, which deed contained a release by the creditors, without any reservation of their remedies against the sureties. C. executed this deed with the privity and approbation of B., and on the understanding that his remedies against B. were not to be prejudiced. C. and two others, who, with him, were trustees of the deed, were the only creditors who executed it; and A. was soon afterwards adjudged bankrupt, the execution of the deed being the act of bankruptcy. A few days after the execution of the deed, B. committed an act of bankruptcy, and was adjudged bankrupt. — *Held*, reversing the decision of the Commissioner (1 Bank. & Insolv. Rep. 65.), that C. was entitled to prove on the note against the estate of B. *Re Blakely, Ex parte Harvey, Ex parte Springfield* (Lords JJ.), 220.

10. A. brought an action against B. for the balance of an account current. A verdict was taken by consent for 100,000*l.*, subject to a reference to an arbitrator, who was to have power to cause a verdict to be entered for either party. After six years the arbitrator made an award in A.'s favour for 11,000*l.* Four days after the award was made, and before judgment had been signed and costs taxed, B. committed an act of bankruptcy, and gave notice of it to A. A. caused judgment to be entered up. B. was adjudged bankrupt, and A. claimed to prove for the sum awarded, with interest and costs.

*Held* (affirming the decision of the Commissioner, p. 201.), that A. was entitled to prove for the debt, interest, and costs, as a liquidated sum, though judgment had not been signed until after notice of the act of bankruptcy; for that the award must not only be referred to and considered as standing in place of the verdict, but as something more, and therefore as establishing a proveable debt, until it was shown that it could be set aside at law. *Harding, appellant, Ex parte Thornthwaite, In re Pickering* (Lords JJ.), 254.

11. Petition to prove for money lent to a trader on the eve of bankruptcy on the security of an assignment, which was declared by the Court of Common Pleas to be void as an act of bankruptcy, and for payment in full of sums expended on the premises assigned, dismissed with costs. *Ex parte Furber, In re Barugh* (Fonblanque, Com.), 262.

12. The sums to be recovered by intending emigrants against shippers or agents failing to provide them with passages according to contract, proveable in bankruptcy. *Ex parte Newcombe, In re Griffiths* (Fonblanque, Com.), 282.

A bankrupt cannot be arrested and committed to prison for breach of contract in failing to provide passages after he has obtained protection. *Id.*

13. The trustee under an assignment for benefit of creditors, which assignment is declared to be an act of bankruptcy, is not a creditor holding security, and may prove his debt under the bankruptcy, notwithstanding the assignment. *Ex parte Bates, In re Meadows* (Evans, Com.), 285.

The Commissioner will not interfere with the B. & I. — VOL. I.

choice of the major part in value of the creditors, unless they choose an improper person; but a trustee who has to account to the bankrupt's estate is not a proper person to be appointed assignee, and if objected to, such appointment will not be sanctioned by the Commissioner. *Id.*

### PROPOSAL.

Where an insolvent proposes to set aside a portion of his income for the benefit of creditors, the Court, in considering the sufficiency of the proposal, will have regard to the circumstances in which he is placed, his condition in life, and the duties imposed upon him. *Re W. G. Masey* (Murphy, Com.), 180.

### PROTECTION.

See *Parting with Property*.  
See *Petition in Insolvency*, 3.

Keeping out of the Way to avoid Arrest. See *Certificate*, 3.

Subsequent Arrest under Passengers Act not sustainable. See *Proof of Debts*, 12.

1. Where a petitioner for protection is an uncertificated bankrupt, in estimating the amount of his debts, those owing under the bankruptcy must be included. *Re Emanuel Newcomb* (Phillips, Com.), 6.

2. In estimating the amount of a trader's debts, upon an application for protection, those owing under a former insolvency must be included. *Re Edward Tuft* (Law, Com.), 6.

3. A. having been committed pursuant to an order of a County Court Judge, for the non-payment of a debt set forth in his schedule, from which he was protected from process by an interim order of protection, it was ordered, on application, that he should be discharged. *Re W. Minnett* (Law, Com.), 11.

4. Where a bankrupt's certificate was suspended for two years without protection, with liberty, after he should have been in custody for three months at the suit of any creditor, to apply for his discharge and for protection, and the bankrupt, pending the two years, was taken in execution, and remained in prison for three months at the suit of a creditor, who had not proved under the estate, — *Held*, that the bankrupt was entitled to his discharge and protection under sect. 112. of the Bankrupt Law Consolidation Act, 1849. *Ex parte Fell, In re Fell* (Fane, Com.), 23.

5. Where an insolvent comes before the Court upon an application for protection under sect. 28. of 7 & 8 Vict. c. 96., the Court will take into consideration all the circumstances of the insolvency, the conduct of the petitioner, as well before as after the insolvency, and adjudicate accordingly. *Re William Miller* (Phillips, Com.), 30.

6. An insolvent, who has been adjourned *sine die*, without protection, until after twelve months from the date of such adjournment, is entitled to his protection after the twelve months have expired under 7 & 8 Vict. c. 96. s. 28.; and to his discharge under sect. 29. *Ex parte Swain, Re Swain* (Fane, Com.), 61.

### PROVISIONAL ASSIGNEE.

Court has no Power to order, to join in Conveyance. See *Jurisdiction in Insolvency*, 3.

## RECOGNIZANCES.

1. A. and E. having entered into recognizances for the appearance of an insolvent at a County Court.—*Held* that this Court may issue a warrant for the estreat of such recognizances, the insolvent not having appeared according to the order for hearing.—*Held*, also, that the rule is absolute in the first instance. *Re James Simons* (Phillips, Com.), 4.

2. Where an insolvent had been discharged from custody on finding two sufficient sureties, who had entered into a recognizance to the provisional assignee for his appearance according to the order for hearing, on a rule to show cause why the recognizance should not be estreated, the insolvent not having appeared.—*Held*, that his illness was a good answer to the rule. *Re James Simons* (Phillips, Com.), 21.

## REGISTRAR.

Jurisdiction to tax Bills of Costs. *See Jurisdiction in Bankruptcy*, 2.

## RELEASE.

Effect of, as Release of Surety. *See Principal and Surety*.

## REPUTED OWNERSHIP.

*See Order and Disposition*, 2, 3.

Possession of Debtor until Default. *See Act of Bankruptcy*, 2.

Notice to an assurance office of deposit of a life policy need not be in writing: a verbal notice is sufficient. *Ex parte Tanner, Re Brock* (Evans, Com.), 156.

The taking possession by the equitable mortgagee, may be at any time before actual bankruptcy. *Ib.*

## RETAINER.

*See Opposition*, 12.

## RULE 22. (INSOLVENCY).

*See Opposition*, 11.

## SCHEDULE.

Wilful Omission of Debt from. *See Petition in Insolvency*, 14.

1. Where an insolvent had disposed of his business shortly before petitioning the Court, but omitted to erase his name from the premises, and the business was carried on as usual by the purchaser,—*Held*, that the description as "lately of that place" was sufficient. *Re H. C. Mower* (Phillips, Com.), 38.

2. Sect. 6. of 10 & 11 Vict. c. 102., gives to the Court for Relief of Insolvent Debtors jurisdiction in all cases in which the insolvent shall have resided for six calendar months next immediately preceding the time of filing his petition, within any parish, the distance whereof, as measured by the nearest highway from the General Post Office in London to the parish church of such parish, shall not exceed the distance of twenty miles. W., a butler to a gentleman who

## SET-OFF.

had establishments both within and without the jurisdiction, had resided at each during the six months.—*Held* insufficient to constitute a residence under the provisions of the Act, and the petition was dismissed. *Re John Whittingham* (Law, Com.), 44.

3. Where an insolvent had omitted to insert the holder of a negotiable instrument, given in respect of a debt in the schedule, on a rule, obtained after the first examination and before the final order, to show cause why the schedule should not be amended by inserting the name of the holder,—*Held*, that the Court had power to allow the amendment at any time before the making of the final order. *Re G. M. Innes* (Murphy, Com.), 207.

4. Where in the statements set opposite to the debts in a schedule an insolvent swears to facts which are manifestly untrue, and it appears that the object in doing so was to mislead, the Court will either dismiss the petition or adjourn the case *sine die*. *Re George Carr* (Phillips, Com.), 210.

5. B., at the desire of his opposing creditor, accepted a bill, "J. E. Baker and Son." The son had no interest in the business, and the transaction was a solitary one.—*Held*, that the description which omitted J. E. Baker and Son was sufficient. *Re John Eli Baker* (Law, Com.), 273.

6. Where an insolvent had described himself in an agreement with his opposing creditor as a "surveyor," and it appeared in evidence that beyond one transaction for a relation he had never been engaged in that capacity, and had never held himself out to the world as such,—*Held*, that his description as an "auctioneer and appraiser" was sufficient. *Re Michael Henry Myers* (Murphy, Com.), 284.

## SECURITIES.

*See Proof of Debts*, 4.

## SEPARATE ESTATE.

Solvent Partner against separate Estate of bankrupt Partner. *See Proof of Debts*, 7.

## SERVANT.

An assistant master in a school, at a fixed salary, is within sect. 168. of the Bankrupt Law Consolidation Act, 1849. *Ex parte Collinet, In re Winter* (Holroyd, Com.), 82.

## SET-OFF.

*See Proof of Debts*, 8.

*See Vendor and Purchaser*.

A., some years ago purchased an estate at an auction, upon conditions, and paid a deposit; but being dissatisfied with the title, he abandoned the contract. The auctioneer retained the deposit.—*Held*, on the bankruptcy of the vendor, that A.'s right to recover was against the auctioneer, and not against the assignees. *Semble*, the auctioneer was not justified in setting off the deposit

## SHARES.

received from A. as against a debt due to him from the bankrupt. *Ex parte Bradshaw, Re Graves* (Evans, Com.), 180.

## SHARES.

How Value of to be estimated. See *Proof of Debts*, 1.

## SHOWING CAUSE.

Enlargement of Time for. See *Adjudication*, 4.

## SOLICITOR.

See *Attorney and Solicitor*.

## STAYING ADVERTISEMENT.

Not on mere Ground of Arrangement with Creditors. See *Adjudication*, 5.

## STOCK-IN-TRADE.

Rights of Assignees to. See *Assignees*, 2.

## SUPERSEDEAS.

Where all the creditors who have proved under the bankruptcy except one, on whose behalf, the creditor being since dead, there is no one able to give a sufficient legal discharge, have been paid in full, and have signed the petition to supersede the fiat, the petition will be superseded accordingly, notwithstanding the bankrupt is an outlaw for not surrendering at his last examination, on payment of the debt due to the deceased creditor into Court. *Ex parte Barley, In re Barley* (Fonblanque, Com.), 117.

## SURETY.

See *Principal and Surety*.

## SURPLUS.

See *Interest*.

## SURRENDER.

A trader, who, by absconding, had committed an act of bankruptcy, upon which he was adjudged bankrupt, several days prior to the adjudication, sailed for Australia; but, being pursued, was brought back, and committed to Newgate for not surrendering under sect. 251. of the Bankrupt Law Consolidation Act, 1849.—*Held*, that, pending the criminal proceedings, this Court would not interfere by allowing him now to surrender, the time for so doing having expired. *Ex parte Spriggs, In re Ashton* (Holroyd, Com.), 42.

## TAXATION OF COSTS.

See *Jurisdiction in Bankruptcy*, 2.

## TRADER DEBTOR SUMMONS.

1. Where a party, summoned to pay a debt under

## UNCERTIFICATED BANKRUPT. 303

sect. 78. of stat. 12 & 13 Vict. c. 106., files an admission as to part of such debt, and makes an affidavit pursuant to sect. 82. of the same statute, that he has a good defence upon the merits as to the residue thereof, and the Court dispenses with his entering into the bond referred to in the same section, such party does not commit an act of bankruptcy by not paying, within seven days after the filing of such admission, the portion of the debt so admitted. *Re Jesse Oldfield* (Lords JJ.), 1.

2. A trader debtor summons issued under sect. 78. of the Bankrupt Law Consolidation Act, 1849, is irregular, where the affidavit of debt, upon which the summons is founded, has been sworn before the delivery of the particulars of demand. *Anonymous* (Evans, Com.), 77.

3. By section 78. of the Bankrupt Law Consolidation Act, 1849, the affidavit of debt and notice must state "the delivery to the trader personally, or to some adult inmate at his usual or last known place of abode or business, of an account in writing of the particulars of his demand." Where the affidavit did not state where the service was effected, the summons was dismissed, with costs. *Anonymous* (Fane, Com.), 115.

4. Where the admission of a debt, under a trader debtor summons, was taken by a solicitor in the country on unstamped paper, and was not stamped until after the day on which the summons was returnable, the Court declined to receive it as an admission under the 84th section of the Bankrupt Law Consolidation Act, 1849; but, *semble*, the point will be reserved, if necessary, as an equitable defence to the adjudication. *Ex parte Anonymous* (Fonblanque, Com.), 116.

5. The sufficiency of the affidavit of debt may be disputed at the time of showing cause against the adjudication, although no objection to it was taken at the return of the summons. *Anonymous* (Evans, Com.), 192.

Where the debt alleged to be due in the summons is founded on a covenant in a deed executed by the intended bankrupt, the affidavit of debt must state all the parties to the deed. *Ib.*

6. The 79th section of the Bankrupt Law Consolidation Act, 1849, gives to the Court a discretion as to whether a bond with sureties is to be required; in exercising which discretion regard is to be had, not merely to the solvency of the alleged debtor, but to the origin and nature of the demand, and the probability of its being such as the claimant can succeed in enforcing. In a case, therefore, where the alleged debt was the balance of an account of transactions purporting to be purchases and sales of tallow, but there was great doubt whether they were not in reality mere time bargains and void at law, as being in the nature of wagers,—*Held*, that a bond ought not to be required. *Ex parte Wood, Re Wood* (Lords JJ.), 235.

## UNCERTIFICATED BANKRUPT.

See *Petition in Insolvency*, 10.

After-acquired Property. See *Assignees*, 4.

Second Petition against, not absolutely void at Law. See *Assignees*, 4.

## UTENSILS.

Fixed and moveable. See *Mortgagor and Mortgagee*, 5.

## VESTING ORDER.

Where a prisoner remains in custody for twenty-one days, without making satisfaction to his detaining creditor for the debt and costs for which he is detained, and the detaining creditor applies for an order vesting the estate and effects of such prisoner in the provisional assignee, under section 96. of 1 & 2 Vict. c. 110., the Court has no power to interfere to stay the issuing of the vesting order. *Re Edwin Hutchinson* (Law, Com.), 63.

## VEXATIOUS DEFENCE.

See *Opposition*, 1, 2. 6, 7. 14.

Where Record in an Action Evidence of, and where not. See *Bail*, 4.

## WITNESS.

A person summoned as a witness, and as suspected of having property of the bankrupt in his possession, is entitled to his expenses in the first instance, where it appears he is only the servant or agent of the party suspected. *Ex parte Bell, Re Bell* (Fane, Com.), 168.

END OF THE FIRST VOLUME.

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THE

**BANKRUPTCY AND INSOLVENCY  
REPORTS ;**

BEING

**REPORTS OF CASES**

ARGUED AND DETERMINED BEFORE

THE COURT OF APPEAL IN BANKRUPTCY, THE COURT  
OF BANKRUPTCY,

AND

**THE COURT FOR THE RELIEF OF INSOLVENT DEBTORS,**

TOGETHER WITH REPORTS OF CASES

CARRIED

BY APPEAL FROM THE COURT OF APPEAL IN BANKRUPTCY

TO

THE HOUSE OF LORDS.

**VOL. II.**

**MICHAELMAS TERM, 1854, TO MICHAELMAS TERM, 1855,  
18 & 19 VICT.**

EDITED BY

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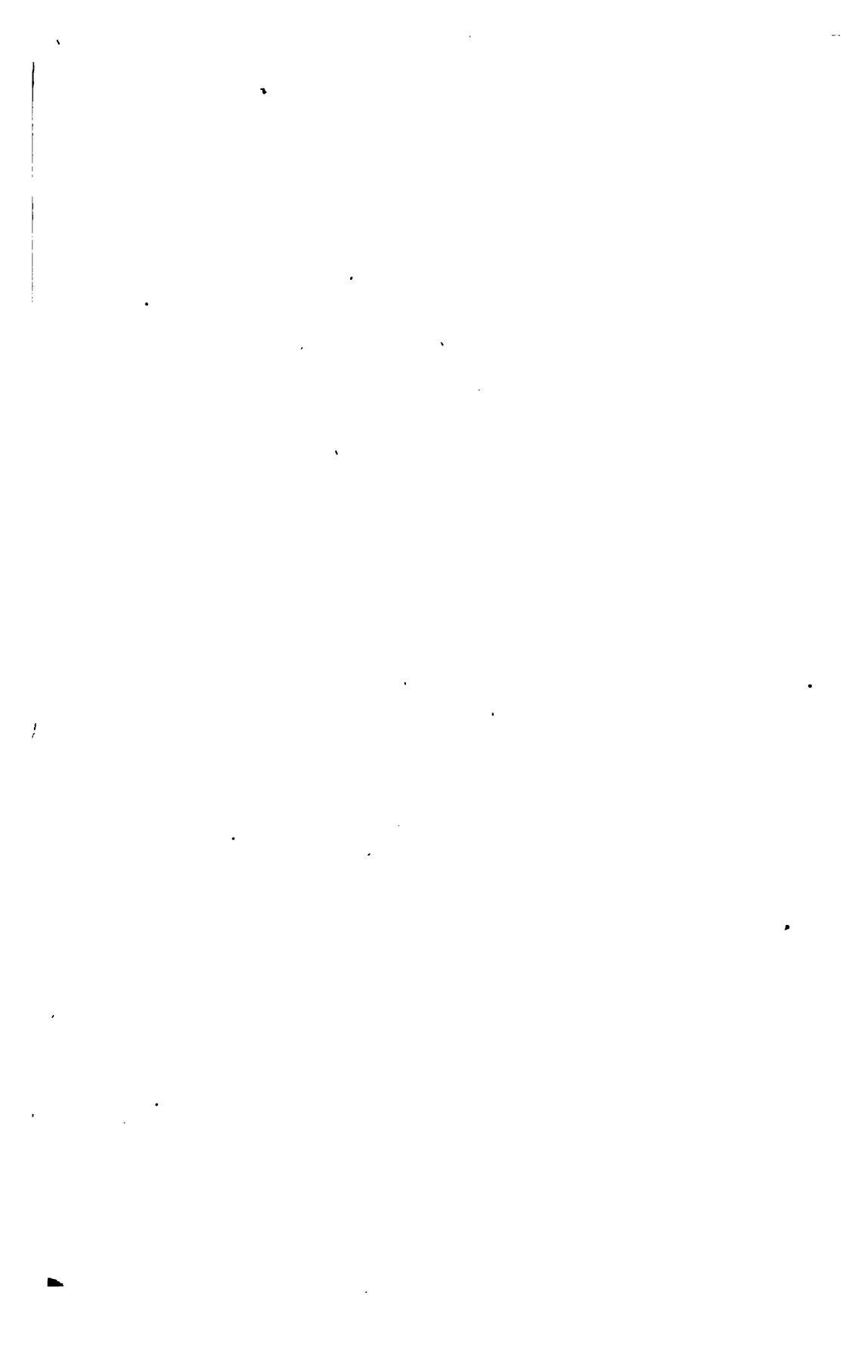
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**1855.**



**JUDGES AND LAW OFFICERS,**  
**FROM MICHAELMAS TERM, 1854, TO MICHAELMAS TERM, 1855.**

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**The Right Honourable LORD CRANWORTH.**

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**Knt.**

**The Right Honourable Sir GEORGE JAMES TURNER, Knt.**

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THE  
BANKRUPTCY AND INSOLVENCY  
REPORTS.

1854.

IN RE ————— (*an arranging Debtor*).

Before MR. COMMISSIONER EVANS.

1854.

COURT OF  
BANKRUPTCY.

Nov. 6.

THIS was a petition for arrangement between a debtor and his creditors, under the superintendence and control of the Court, filed by virtue of section 211. of the Bankrupt Law Consolidation Act, 1849. The petitioner had duly filed an account of his debts and of his estate and effects, under section 214., in the form prescribed by the rules of Court. In such account the petitioner stated that A. B. was indebted to him in the sum of 660*l*. for work and labour, and had also possessed himself of property belonging to the petitioner, and which the petitioner had previously purchased from the said A. B., of the value of 1750*l*. The alleged debt due to the petitioner and the property stated to be in the possession of A. B., having been claimed by the official assignee under the petition, A. B. alleged in reply that he owed nothing to the petitioner, but that in fact, on a balance of accounts, he was a creditor. At the instance of the solicitors conducting the petition, the Commissioner granted a summons calling upon A. B. to attend and be examined, as a person alleged to have in his possession property belonging to the petitioner.

The Court has jurisdiction, under a petition for arrangement, to compel a witness to be examined upon oath, if such examination involve the inquiry whether the petitioning debtor has made a full and true disclosure of his debts and effects, as required by section 223. In determining upon the jurisdiction to examine a party summoned, the form of the summons is immaterial, when the witness is in fact before the Court ready to be examined.

*Argument.*

*Gray*, counsel, now appeared on behalf of A. B., the party summoned, and objected that the Court had no jurisdiction to compel the witness to be examined. Special authority was given by statute to examine all persons with reference to their dealings and transactions with bankrupts, but here was no bankruptcy, and the sections of the Consolidation Act, relating to arrangements under the control of the Court, gave no such

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 COURT OF  
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 IN RE —.

power. The person summoned as a witness therefore declined to be sworn or examined.

*Bagley*, counsel for the assignee under the petition, contended that as the Court had jurisdiction generally in proceedings by arrangement by section 4. of the Bankrupt Law Consolidation Act (*a*), all that was necessary for giving effect to the jurisdiction was to be implied. But in the present case, the Court had express authority under section 223. By that section the Court was bound to adjudge any petitioner a bankrupt who failed to make a full and true disclosure of his debts and effects. Here the question was, whether the petitioner had in his accounts truly stated his claims upon A. B., the party summoned, and for the purpose of determining that question, the Court, in the words of the section last cited, has "power at any time, on the application of any creditor, to appoint a private sitting for the purpose of such inquiry, and may summon before it such petitioning trader, or *any other person*, and examine him upon oath touching such matters."

*Gray*, in reply. The summons under which A. B. attends, does not indicate that he is required to be examined for the purpose of inquiring whether the petitioner should be bankrupt; he is described in the summons as a person charged with having in his custody or control the petitioner's estate.

*Judgment.*

MR. COMMISSIONER EVANS. As the witness does in fact attend, it is immaterial in what terms the summons is framed. I have no doubt the intention of the Legislature was to give the Court power to examine a witness supposed to have the property of an arranging debtor, and refusing to give it up, and I own I am desirous, if the Act of Parliament allows of it, to assist the creditors by enforcing the examination. The difficulty I have had was to find where the Legislature gave the power; but I think it may be got rid of in the mode suggested by Mr. *Bagley*. Section 223. does give power to examine any person for the purpose specified in that section, and the examination of the witness may be necessary for that purpose. I shall therefore require the witness to be sworn and examined, and if he refuses, it will be my duty to enforce the authority of the Court.

The witness was then sworn and submitted to be examined, the examination being conducted in private.

Solicitors: *Lawrence, Plews, & Boyer*; *Deakin & Dent*, Wolverhampton.

## EXPARTE METCALF.

Before MR. COMMISSIONER EVANS.

**METCALF**, previous to being adjudicated a bankrupt, was arrested and taken into the custody of the sheriffs on a writ of *capias utlagatum*, founded on a judgment on an action on bills of exchange. The bankrupt having surrendered to the adjudication, and having obtained his protection, now applied for his discharge from custody. The assignees joined in the application.

*Lucas* objected to the jurisdiction in this case, as the cause of detention was not debt, as appeared from the return of the writ, but contempt, which must be cleared before the Court out of which the outlawry issued. An outlaw has no *locus standi in curia* to ask for anything to his advantage: *Beauchamp v. Tomkins*. (a)

*Bagley*, for the bankrupt. The outlawry may be reversed on payment of costs. The application is not solely for the bankrupt's benefit, but the assignees join, considering that the estate would be benefited by the bankrupt's release, which would enable him to assist in making up his accounts: *Exparte Helsby*. (b) He referred to the statute 12 & 13 Vict. c. 106. s. 102.

**MR. COMMISSIONER EVANS.** It must be considered that the bankrupt is in custody really for debt, and therefore I have the jurisdiction to order his discharge; and as it appears that the estate would be benefited by the bankrupt being at liberty, I shall order him to be released from custody.

Solicitors: *Hillyer & Fenwick; Lawrence, Plews, & Boyer.*

(a) 3 Taunt. 141.

(b) 1 Dea. & Ch. 16.

## IN RE ROWLEY.

Before MR. COMMISSIONER HOLROYD.

**THE** bankrupt applied for his certificate. No notice of opposition had been given, and the assignees did not oppose as assignees.

*Lawrence*, solicitor for a creditor, who was also one of the assignees, sought to oppose the granting of the certificate,

tion is in respect of a complaint peculiar to themselves as individual creditors.

1854.  
COURT OF  
BANKRUPTCY.  
Nov. 9.

The Court has jurisdiction to discharge from custody a bankrupt detained on a *capias utlagatum* founded on a judgment in an action on bills of exchange.

Argument.

Judgment.

COURT OF  
BANKRUPTCY.  
Nov. 28.

The assignees of a bankrupt are at liberty to oppose the granting of the certificate without giving notice although their opposition is in respect of a complaint peculiar to themselves as individual creditors.

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COURT OF  
BANKRUPTCY.

RE ROWLEY.

*Argument.*

notwithstanding that his client had omitted to give the proper notice of opposition, he relied upon *Exparte Wells*. (a)

*Bagley*, for the bankrupt, contended that the case cited on the other side only applied to oppositions by assignees, in their character of assignees. Such was not the case in the present instance, where (as was admitted) the opposition was founded on some wrong supposed to have been done by the bankrupt to the creditor, as an individual; and for the purpose of being heard against the certificate he ought, under these circumstances, to be as much bound to give notice as any other creditor, notwithstanding the accident of his being an assignee.

*Judgment.*

MR. COMMISSIONER HOLROYD. On looking at *Exparte Wells*, where assignees were permitted to oppose the granting of the certificate, without giving notice, it does not appear to me that the Court drew any distinction between an opposition by assignees, in their character of assignees, or as individual creditors; and I do not think that I am at liberty to raise such a distinction now. I must, therefore, bear the opposition. But that no injustice may be done by the bankrupt being taken by surprise, I will, if required, adjourn the sitting, in order that he may have the opportunity of preparing himself to meet anything that may be urged against him.

*Bagley* did not ask for an adjournment.

Solicitors: *Sole & Turner; Lawrence, Plews, & Boyer.*

(a) 19 L. J. Bk. 5.

COURT OF  
BANKRUPTCY.

Dec. 1.

Messrs. S. & Co., auctioneers, having overdrawn their account at their bankers, Messrs. C. & Co., a short time before their bankruptcy, came to a parol un-

derstanding with them that the old account should be closed, and that a new account should be opened, which was to be kept sacred against the claims of C. & Co. for the balance due to them.

S. & Co. were in the habit of drawing on the new account for general disbursements, and having received considerable sums from the proceeds of sales made on behalf of the petitioner and other customers, paid portions thereof into the new account. Held, that the moneys included in the new account passed to the assignees.

A sum received by S. & Co. after the bankruptcy, in respect of a sale for a customer, and paid to the official assignee, was ordered to be repaid to the customer.

## EXPARTE PARSONS, IN RE SHUTTLEWORTH.

Before MR. COMMISSIONER FONBLANQUE.

THE petition in this case stated the adjudication on the bankrupt's own petition, dated May 30. 1854.

That the bankrupts, previous to that time, carried on the business of auctioneers.

In April last, the bankrupts were in embarrassed circumstances, and their account with their bankers (Messrs. Currie & Co.) was overdrawn.

On the 13th of April, the bankrupts had in their possession several cheques amounting to about 80*l.*, which they had received in the course of their business on account of their clients, and they were in the expectation of receiving other moneys on similar accounts.

The bankrupts, being in hopes of being able to continue their business, considered that the cheques in their possession and the moneys to come to their hands in respect of their clients, ought to be secured to those clients respectively, and not to be applied as general assets of their house. Accordingly, at an interview between one of the bankrupts, Shuttleworth the younger, and Messrs. H. and W. Currie, two of the partners of the house of Currie & Co., it was agreed that the account then existing between the bankrupts and Messrs. Currie should be closed, and that a new account should be opened between them, which should be held sacred against any claim of Messrs. Currie for the balance due to them on the old account. The new account was opened on or about the 14th of April, and the bankrupts shortly after paid the 80*l.* by cheques, and other moneys, amounting in all to 2013*l.* 19*s.* 5*d.*, to such new account. A large part of this sum was received by the bankrupts in respect of the proceeds of a sale made by them on behalf of the petitioner, on the 4th of May and two following days, at which time they were believed to be in prosperous circumstances as auctioneers. By an account delivered to the petitioner after the bankruptcy, there appeared to be a balance due to him of 756*l.* 14*s.* in respect of the proceeds of the sale: but the bankrupts had paid 799*l.* 19*s.* 6*d.*, part of such proceeds, into the new account at Messrs. Currie's, retaining in their hands 21*l.* 0*s.* 6*d.* up to the time of their bankruptcy, and a sum of 16*l.* 11*s.*, received since the bankruptcy, had been paid to the official assignee.

A cheque for 500*l.*, drawn by the bankrupts in favour of the petitioner against the new account, was presented at Messrs. Currie's, but returned unpaid.

The petition prayed that the sum of 756*l.* 14*s.*, being the net proceeds of the sale due to the petitioner, might be paid to him out of the balance of the new account, which was 1262*l.* 14*s.* 11*d.*; or that the sum of 719*l.* 2*s.* 6*d.*, part thereof, might be paid out of the balance, and that the two sums, 21*l.* 0*s.* 6*d.* and 16*l.* 11*s.*, might be repaid to the petitioner by the official assignee, and for further relief.

The petition was supported by sufficient affidavits, and the facts were not disputed.

*Murray*, solicitor for Messrs. Currie, submitted to the jurisdiction of this Court.

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COURT OF  
BANKRUPTCY.  
EX PARTE  
PARSONS, IN RE  
SHUTTLE-  
WORTH.  
*Statement.*

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COURT OF  
BANKRUPTCY.

EX PARTE  
PARSONS, IN RE  
SHUTTLE-  
WORTH.

Argument.

•

*Vallings*, solicitor for the petitioner. The object of the bankrupts in opening the new account was, to secure the moneys of their customers from being applied by the bankers in reduction of the old and overdrawn account; the moneys of the petitioner, being paid into the new account, were separated from the general account of the bankrupts, and were held by the bankers upon a trust arising out of their agreement with the bankrupts, as if in trust for the petitioner. The balance in the hands of Messrs. Currie exceeds the sum claimed by the petitioner: it is therefore to be presumed that any drafts by the bankrupts on the new account must have been drawn in respect of moneys paid prior to those paid on behalf of the petitioner, or in respect of charges due to themselves; but there is now a clear sum in the hands of the bankers belonging to the petitioner, and out of the order and disposition of the bankrupts: *Pincett v. Wright* (a), *Ex parte Smith* (b), *Bodenham v. Hoskins* (c), *Pennel v. Deffell*. (d)

*Bagley*, for the assignees. It appears from the proceedings that out of 1040*l.* due by the bankrupts to unsecured creditors, no less than 926*l.* is due to those in exactly the same situation as the petitioners.

The claim of the petitioner is founded on no more than a private understanding between the bankrupts and their bankers, (to which none of the creditors were parties), to protect the future accounts of the bankrupts for a time against the claims of the bankers in respect of the existing and overdrawn account. No title is given to the new account to distinguish it from any ordinary banking account, nor are the cheques drawn in other than the ordinary manner, except that the letters N. A. are added after the signature. It appears from the books now in Court, that the account is not in fact an account of deposits, but a general account of any moneys which might come to the hands of the bankrupts from any source whatever, and cheques for various general disbursements have been drawn upon it; so that the fund has not in reality been "kept sacred" by the bankrupts.

Money paid into a bank becomes part of the general assets of the bankers, and cannot be ear-marked: *Devaynes v. Noble* (e), *Foley v. Hill*. (f)

In the cases cited on the other side, the property was clearly distinguishable from general estate, or there was a privity between the depositors of the property and third parties claiming it.

*Murray*, solicitor for Messrs. Currie, drew the attention

- (a) 2 Hare, 120.
- (b) 4 Dea. & Ch. 579.
- (c) 21 L. J. (N. S.) Ch. 864.
- (d) 23 L. J. (N. S.) Ch. 115.

- (e) 1 Mer. 568.
- (f) 2 H. L. Cases, 28.; and see Mr. Commissioner *Holroyd*, *In re St. Alban's Bank*, 1 Fonb. 87. to 92.



of the Court to the state of the banking accounts, and argued that the petitioner had no lien on the new account. The greater number of the creditors have the same right against the fund as the petitioner.

*Vallings*, in reply. In a drawing account the cheques are drawn against the sums paid in. Here the sum paid in is not exhausted.

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COURT OF  
BANKRUPTCY.

EX PARTE  
PARSONS, IN RE  
SHUTTLE-  
WORTH.

MR. COMMISSIONER FONBLANQUE. I regret to say, for the sake of many others as well as the petitioner, that I cannot distinguish this case from one of ordinary misapplication of moneys. It appears that there was some arrangement between the bankrupts and their bankers, to which no creditors were parties, and certain moneys properly belonging to the petitioner and many other creditors, have been paid into the bank. These moneys were not ear-marked, nor are they capable of being separated from the general assets of the bankrupts, any more than a bucket of water thrown into the Thames can be distinguished from the contents of that river. The cases cited in support of the petition were decided on the grounds that there was an existing declared trust, and in such cases Courts of Equity have always endeavoured to trace such trusts, and carry them into effect. But here I do not see that even a constructive trust can be raised. I must therefore refuse the prayer of this petition, except as to the smaller sum which remained in the hands of the bankrupts, having been paid to them after the bankruptcy.

*Judgment.*

Judgment accordingly.

Solicitors: *Vallings & Co.*; *Crowder & Maynard*; *Murray & Rymer*.

## RE JAMES HOBBS.

Before MR. COMMISSIONER MURPHY.

ON the 20th of January 1854, the insolvent filed a petition under the Protection Statutes, and received a final order on the 10th of March following. On the 3rd of November, a judgment summons was issued against him, at the suit of Messrs. Levy & Morgan, whose debt was set out in the schedule. On the 7th of the same month the insolvent attended the Whitechapel County Court, and exhibited to the Judge his final order, and also a certified extract from his schedule, showing the debt of the

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 8.

Where an insolvent is committed to prison by the order of a County Court for the non-payment of a debt which is set out in the schedule, and the order for committal is

subsequent to the date of the final order, this Court will grant a discharge

1854.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

IN RE JAMES  
HOBBS.

plaintiffs to be duly inserted. The Judge notwithstanding ordered a committal to prison for a period of forty days, and the insolvent was forthwith taken into custody.

*Reed*, now moved on an affidavit of the above facts, for his discharge under section 29 of 7 & 8 Vict. c. 96.; and cited *Re Minnett*(a) and *Re Symonds*.(b)

*Judgment.*

MR. COMMISSIONER MURPHY said: To commit an insolvent for the nonpayment of a debt in respect of which he was protected by his final order, was manifestly inconsistent with the policy of the Act, and as the Legislature had armed the Court with the authority, he should order a discharge.

Attorney: *Munday*.

(a) 1 Bank & Insolv. Rep. 11.

(b) 15 L. T. 304.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 10.

The Court will not require a creditor to prove his debt for the purposes of an opposition, where the same is admitted in the schedule, and judgment obtained against the insolvent.

*Judgment.*

RE SAMUEL HINDS.

Before MR. COMMISSIONER MURPHY.

*NICHOLLS* appeared to oppose; *Sargood* objected to the opposition, and called on the creditor to prove his debt.

MR. COMMISSIONER MURPHY. The 72nd section of 1 & 2 Vict. c. 110. provides that "no creditor shall examine or oppose the discharge of an insolvent until he has made oath or affidavit of his debt, or given other satisfactory proof of his right to oppose if required so to do by such prisoner." The insolvent here has admitted the debt, and judgment has been obtained against him, and moreover, as these facts were stated in the schedule, the insolvent would have to swear to them. The Court could not well have more satisfactory evidence of the creditor's right to oppose, and I shall not call upon the creditor to prove his debt.

Attorney: *Lewis & Lewis*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 15.

A creditor having been plaintiff in an action to re-

RE MICHAEL HENRY MYERS.

Before MR. COMMISSIONER MURPHY.

THE insolvent was opposed by *Sargood*, and supported by *Nicholls*.

The facts of this case fully appear in the following judgment:—

**MR. COMMISSIONER MURPHY.** The insolvent Michael Henry Myers entered into an agreement (which it is unnecessary more particularly to specify) with Henry Solomon, to proceed to Melbourne, and dispose of certain property consigned to him by Solomon for the benefit of the latter, subject to certain allowances contained in the said contract. During the insolvent's absence, Solomon became bankrupt. On the insolvent's return to England an action was brought against him by the assignees of Solomon (the now detaining creditors) for a sum of 3915*l.* 5*s.* 7*d.*; they disputing the fairness of the account rendered by the insolvent from time to time to Solomon. The insolvent applied for a commission to examine witnesses at Melbourne, to prove that he had made all the disbursements set out in this account, and, in fact, that no portion of the moneys had been appropriated to his own use, or in any other way than as stated in his rendered accounts. By an order of Mr. Baron *Alderson*, bearing date on the 21st day of April 1854, it was ordered that, in consequence of the insolvent (the defendant in the action) waiving his demand for a commission, and the plaintiffs thereby consenting to admit on the trial of the action that all the sums set forth in the account delivered to the plaintiffs, and pleaded as a set-off in this action, were *bonâ fide* made and paid; and also that the defendant had in such account given credit to the plaintiffs for all moneys received on account of the bankrupt in respect of which the action was brought, and had also duly accounted to the plaintiffs, as such assignees, for all goods received by him on account of the bankrupt; the only question for trial should be whether the sums so taken credit for by the defendant were all properly taken credit for, and chargeable against the plaintiffs within the meaning of the contract set forth in the declaration, and the contract referred to in a certain order of Mr. Baron *Platt*, bearing date the 8th day of February 1854.

At the trial of the cause a verdict was found against the defendant, subsequently reduced by the Court to 1200*l.*, for which amount, together with the costs, the plaintiffs arrested the insolvent, and now detain him in custody. The insolvent having petitioned this Court, the detaining creditors seek to oppose his discharge, on the ground that he still retains in his possession moneys arising from the sale of Solomon's goods, fraudulently appropriated by him. To this an objection is made, that they are estopped by their own consent at the trial of the cause, when they admitted the *bona fides* of the application of the proceeds by the insolvent, from now entering into that inquiry, and the question I have to determine is,

1854.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE MYERS.

cover money received on his account, the defendant pleaded by way of set-off payments made in Australia, on account of the plaintiff, and applied for a commission to examine witnesses, whereupon the plaintiff, under a judge's order, admitted such payments to have been made, and went to the jury on the question only whether they could be charged against the plaintiff, under the agreement between the parties. A judgment being recovered for the plaintiff, and the defendant becoming an insolvent, — *Held*, that the plaintiff, as an opposing creditor, was not, by his admission in the action, precluded from inquiring under the insolvency whether the payments so admitted had been in truth made by the insolvent, as, if not, assets may exist applicable to a dividend.

*Judgment.*

1854.  
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RELIEF  
OF INSOLVENT  
DEBTORS.

RE MYERS.

*Judgment.*

whether, in my judgment, they are so concluded by that admission.

The argument addressed to me proceeded on the assumption that the admission at the trial was absolute, and equivalent to the finding of a jury upon the point. I shall show, afterwards, that this was not so. Had there even been a judgment, in fact, I might be called upon to consider in what position the creditor would stand, in case (the whole matter having been submitted to a jury, and they having found that all the moneys had been properly expended, except the 1200*l*.) he should subsequently discover that the data on which the jury proceeded were erroneous, and the money was still in possession of the insolvent at the time of coming up for hearing, without being vested by him in the provisional assignee. If, indeed, the creditor were to claim to be inserted as a creditor for the full amount, I should refuse him, on the ground that the same question came directly in controversy between the same parties in this Court which had already been decided between them in another Court of competent jurisdiction. But it appears to me that the situation of the parties is altogether changed, if the claim of the creditor is not to demand insertion as a creditor for that amount, but simply to inform the Court that a fund is in the hands of the insolvent applicable to the payment of a dividend on his admitted debt and those of the general body of the creditors.

The moment the insolvent comes to this Court, the parties are virtually changed. The litigants are no longer the creditors and the insolvent, but this Court and the insolvent. A simple reference to the *rationale* of the system will abundantly show this. The creditor who is unpaid arrests the insolvent; he comes voluntarily to this Court for relief; and the law prescribes, in reference to this Court, how he is to proceed. First, he must present a petition, in which he prays for relief from debt, on the condition of surrendering all his estate and effects into the hands of the officer of this Court. Subsequently a vesting order issues, whereby the Court directs that the property shall so vest. Afterwards he must frame a schedule, and swear to its truth, stating all his property, wheresoever and whatsoever; and upon the day fixed for the hearing the Court has a right to examine into the truth of the schedule, either by examining the insolvent, or by any witnesses it shall think fit to call. All this the Court does, whether any creditor opposes or not. The issue is no longer between the insolvent and the creditor; it is an issue between the insolvent and the Court; for the very foundation of his claim for relief, and the very jurisdiction of the Court, depends on a complete surrender

of his effects. The creditor, it is true, may oppose; but still he is not to be considered in the light of one at issue with the insolvent, where the question is the endeavour on his part to establish a fund to increase his dividend, any more than the prosecutor in a criminal case who proves the guilt of a prisoner, the issue being between the prisoner and the Queen. For these reasons, therefore, even after such a judgment as I have before alluded to, I should certainly, with my present views, be inclined to hold that, when the creditor appears not to assert a claim to be a creditor for a larger amount than the finding of a jury warrants, but simply to inquire into property in order to aid the Court in its peculiar function, and to increase, if you will, his own dividend, the finding of the jury does not interfere with his so doing. The admission is not an absolute and unqualified admission; it is simply for the purposes of the trial. The issue to be determined fully shows this. The issue was not whether the disbursements were all made as alleged; but merely, supposing such disbursements to have been made, are they allowable by the terms of the contract between Solomon and the insolvent? The finding is that, to the extent of 1200*l.*, he has made alleged disbursements not warranted by the contract. It is consistent with this finding that the disbursements were not made, in point of fact, not only to the extent of the 1200*l.*, but equally to the entire amount as furnished in the insolvent's account. If so, it is clearly admissible for the detaining creditor to prove that from the proceeds of the sale of Solomon's goods and moneys retained by him, he is in a condition to pay them a dividend in respect of 1200*l.* and costs, and that the disbursements, in point of fact, were never made.

Having thus decided the clear right of the detaining creditor to inquire into these specific matters, I cannot, at the same time, shut my eyes to the disadvantageous position in which the insolvent is placed. It may have been that, had the commission issued, the insolvent would have been in a position to prove the actual disbursements of the entire moneys received into his hands, in a manner to satisfy the Court of his *bona fides*; and, even in respect of the 1200*l.* expended according to the finding of the jury, this even may, although not properly within the allowance of the contract, have still been expended *bonâ fide* by the insolvent. There is an essential difference between acts done not warranted by a contract, where a party intends to act *bonâ fide* and those where he intends the contrary. As the detaining creditors, therefore, by opposing the insolvent's demand for a commission, have shut him out from resorting to Melbourne for the proofs requisite, as he alleges, for his defence, it is reasonable

1854.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE MYERS.

Judgment.

1854.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

that the Court should grant him, if he demands it, an extension of time, for the purpose of obtaining the necessary evidence when his own examination shall have concluded.

## RE JAMES RICHARDSON.

Before MR. COMMISSIONER PHILLIPS.

Nov. 27.

Where, in order to give jurisdiction to the County Courts, a portion of a debt has been abandoned, under s. 63. of 9 & 10 Vict. c. 95., in estimating the amount of a petitioner's debts under the protection statutes, the residue only will be taken into consideration.

Statement.

THE insolvent, a coal-dealer, whose debts amounted to 248*l*. 7*s*. 8*d*., appeared on his final order opposed by *Dowse*. He had filed his petition under the protection statutes, on the 24th of July 1854. In the month of March preceding he had been sued in the County Court for 50*l*. The particulars of demand annexed to the summons were as follows:—

" 1853.	Amount brought forward	-	-	-	£297	16	2
	Credit, Aug. 26/53, Cash	£4	4	0			
	27/53, Do.	5	9	9			
	30/53, Do.	1	3	0			
					10	16	9
					£286	19	5

" We are willing to reduce the above claim of 286*l*. 19*s*. 5*d*. to fifty pounds, to bring it within the jurisdiction of the County Court.

" DICKENS & Co.

" March 1st, 1854."

Judgment was given for 50*l*., and the debt due to Dickens & Co. was inserted in the schedule at that amount.

Judgment.

MR. COMMISSIONER PHILLIPS. Unless the effect of the note to the particulars of demand be to discharge the insolvent from the difference between 50*l*. and 286*l*. 19*s*. 8*d*., his debts exceed 300*l*., and the Court has no jurisdiction.

*Reed.* Section 63. of 9 & 10 Vict., c. 95. is decisive upon that point. The words are, where a plaintiff has cause of action for more than 20*l*. (subsequently extended to 50*l*.), he " may abandon the excess, and thereupon the plaintiff shall, on proving his case, recover to an amount not exceeding 20*l*.; and the judgment of the Court upon such plaint shall be, in full discharge of all demands in respect of such cause of action."

MR. COMMISSIONER PHILLIPS. There is an end to the question; it is quite clear the insolvent is discharged from all demands except the 50*l*.

Attorneys: *T. Binns*; *E. R. Bussel*.

## RE HENRY JOHN BROAD.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, a petitioner for protection, appeared on his interim order.

He was opposed by a creditor in person; but it appearing from the evidence that he had threatened to oppose unless settled with,

MR. COMMISSIONER PHILLIPS said he should not allow the creditor to be heard. He had endeavoured to benefit himself at the expense of other creditors; if such conduct were permitted, an insolvent might often be tempted to secrete his assets in order that he might silence an opposition. (a)

Attorney: *Marshall*.

(a) *Vide Re W. Penfold*, 1 Bank. & Insolv. Rep. 220.

1854.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 27.

Where a creditor endeavours to make terms for himself, and threatens an opposition unless those terms are complied with, the Court will not permit him to oppose.

## RE ROBERT GEORGE WILLIAM WEAR.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent appeared on his interim order, supported by *Sargood*.

*Reed* opposed on behalf of a freehold land society, who complained of being inserted as debtors in the insolvent's schedule. There was no pretence for such an insertion, and the directors were desirous of having the same obliterated. [Mr. Commissioner Phillips. How can I hear the directors? They are not creditors, and do not pretend to have any claim upon the insolvent.] They were damnified by the statement, and might be sued by the assignee. If an insolvent swore that a particular person owed him money, the alleged debtor had a right to be heard, as well to relieve himself from possible inconvenience as to inform the mind of the Court.

MR. COMMISSIONER PHILLIPS. The directors are not creditors, and if called upon by the insolvent they could not prove a debt. The practice has been for years only to hear creditors, and I cannot disturb that practice by admitting the opposition.

Attorneys: *Plowright*; *E. W. Moss*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 27.

Where an insolvent had inserted a society in his schedule as debtors who appeared to deny and to complain of such insertion, — *Held*, that creditors only could be heard, and opposition disallowed.

*Argument.*

*Judgment.*

1854.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 29.

Where an insolvent distributes his property and shortly afterwards applies for protection, the Court will adjourn his case *sine die*.

## RE JOHN BUCKWORTH HERNE SOAME.

Before MR. COMMISSIONER MURPHY.

THE insolvent, a petitioner for protection, appeared on his interim order, supported by *Dowse*. In March last he had sold the business in which he was then engaged as a publican, for 230*l*. To some of his creditors he had offered a composition of 5*s*. in the pound, which, not being unanimously accepted, the greater portion of the 230*l*. was paid to relations, and the residue consumed by himself. He admitted his debts in March were 300*l*. and upwards. In October he filed his petition, but he had no assets to offer to creditors.

*Argument.*

*Sargood* submitted the insolvent ought to have come to the Court in March with the 230*l*., and that he had no right to disburse the money himself, preferring his own relations to other creditors. Such a petition should receive no benefit under the Act, and the case must be dismissed, or adjourned *sine die*.

*Judgment.*

MR. COMMISSIONER MURPHY said he quite agreed with the rule laid down by his brother Commissioners, that it was not necessary for an insolvent to bring property into Court to entitle him to the benefit of the Act; but if he had property, and choose to distribute it himself amongst a few of his creditors, to the prejudice of the many, and then asked for protection, the Court would act upon the principle laid down in *Re W. H. Browne*. (a) In that case the Chief Commissioner *Law* said: — "It is an everyday excuse that a dividend is offered, and that all the creditors would not consent to accept it. But, if that be so, it is no justification for spending the money. The petitioner should have come to the Court when he had something to divide. He has not done so; he should not have waited till the property was all gone. The Court was open, but the petitioner did not apply till the estate was all gone. That will not do." This case was analogous: the insolvent might have presented a large dividend to his creditors, but he waited until his estate was gone, and then filed his petition; and the Court could not forget the insolvent had given a preference to his relations and others. A day would be named for the final order, and then the case would be adjourned *sine die*.

Attorney: *T. D. Keighley*.

(a) *Macrae's Practice*, 12.



## RE JOHN DESIRE CREMMENS.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, who described himself as a doctor of medicine, and whose debts amounted to 2002*l.*, appeared on his adjourned interim order. Between the months of February and June 1852, he had purchased of the opposing creditor furniture to the amount of 203*l.* 8*s.* He had paid 25*l.* on account of the debt, and given his acceptances for the remainder, which were dishonoured at maturity. Shortly after the delivery of the last lot of goods, he had let his house furnished, and left the neighbourhood; and the opposing creditor had been unable to discover his retreat. In May 1853, he had borrowed, upon the security of his furniture, 700*l.*, in order to pay a creditor who was then pressing him, and who had threatened legal proceedings. He admitted his debts at that period amounted to 1400*l.* and upwards, the greater portion of which were still unpaid. In July 1854 he petitioned for protection.

*Reed* objected that the insolvent ought to have come to the Court in 1853, when he had property to divide amongst his creditors; and cited *R. W. H. Smith*. (a) Secondly, that the debt had been contracted without a reasonable expectation of paying the same.

*Dowse* supported.

MR. COMMISSIONER PHILLIPS. I am always unwilling to determine a case on the ground of fraud, where justice can be done on other considerations; I shall, therefore, say nothing as to the expectations of the insolvent at the time of contracting this debt. I shall say nothing of the motives which might have induced the assignment of the property, or whether the insolvent and Pratt, who received the greater portion of the money advanced in May, were in a confederacy and collusion together. I pass by all these considerations, because I think there is a principle involved, which, without imputing fraud, must deprive the insolvent of the benefit of the Act. I have always felt that persons who desire the benefit of these very lenient statutes should come to the Court with some estate, yet I must admit I was one of those who almost unanimously construed these Acts otherwise, and permitted men to apply for relief without presenting property to the Court. I did so rather than set an example of distraction between the decisions of the Judges presiding in insolvency. But that the Act did not apply to such cases was

(a) *Macrae's Practice*, 122.

1854.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Nov. 30.

Where an insolvent disposes of his estate to one creditor, and subsequently applies to the Court for protection against the rest, his case will be adjourned *sine die*.

Statement.

Argument.

Judgment.

1854.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

IN RE  
CREMMENS.

*Judgment.*

considered by Mr. Commissioner Ellison of Newcastle, who had the boldness to act upon his decision, and to refuse the benefit to those who came to the Court without a something for creditors. It is clear that no man, owing considerable sums of money, has a right to say that one creditor shall have the whole of his property, to the prejudice of the rest. Now, what is the case here? The insolvent selects furniture to a considerable amount, promising to pay for the same speedily. He does pay a small sum, and the creditor continues to deliver up to the month of June 1852. It is admitted that in this year the insolvent owed Pratt several hundred pounds, and that towards the end of the year Pratt threatened him with legal proceedings, unless the same was paid; upon which the insolvent, in order to raise some money, makes over to one of his creditors every article of furniture he has in the world. Was he able at that time to pay his debts? It is plain he was not; he was afraid of Pratt, of imprisonment, and of arrest. What, then, was his duty? His clear duty was to comply with the preamble of the statute (a), and to bring his property into Court for general distribution. He did not do so; but in 1854 he files a petition under these lenient statutes, and says, "I have no property, I have given it all to one of my creditors, who lent me some money, and I have nothing for the others." I have no doubt what my duty is. The insolvent is without the benefit of the Act, and the case must be adjourned *sine die*.

Attorneys: *Roberts; Lewis.*

(a) Whereas it is expedient to protect from all process against the person, such persons as have become indebted without any fraud or gross

or culpable negligence, so as nevertheless their estates may be duly distributed among their creditors.—5 & 6 Vict. c. 116.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
*Dec. 7.*

Where an insolvent becomes security for other persons at a period when he is unable to pay his own debts, the Court will refuse an immediate protection.

## RE HENRY JAMES ROLFE.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent had become a surety for other persons, at a period when he was unable to pay his own debts. He now appeared on his interim order, supported by *Dowse*.

MR. COMMISSIONER PHILLIPS said he could not name a day for the final order. The insolvent had put himself out of Court by his own conduct; he had no right to pretend to secure the debts of other people at a time when he was unable to pay his own; however, as the amount was small, he would permit him to apply under the 28th section (b) in a fortnight.

Attorney: *Butt.*

(b) 7 & 8 Vict. c. 96.

## RE EDWARD BATTY.

Before MR. COMMISSIONER PHILLIPS.

**T**HE insolvent came up on his interim order.

*Sargood* appeared to oppose and *Nichols* supported.

Evidence was given that the creditor had threatened to oppose unless the insolvent consented to renew his debt by giving bills for the same.

MR. COMMISSIONER PHILLIPS. The invariable practice here is to refuse to hear a creditor who seeks to benefit himself, and threatens an opposition unless the terms he proposes are complied with.

Opposition disallowed.

1854.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Dec. 4.

Where a creditor threatens an insolvent with an opposition unless his debt be renewed the Court will not permit such creditor to be heard.

## RE FRANCIS PEARCE.

Before MR. COMMISSIONER PHILLIPS.

**T**HE insolvent, a petitioner under the protection statutes, appeared on his first examination, supported by *Reed*. It appeared that for two or three months previous to the filing of his petition, he had been residing at Maldon, in Surrey, at a place called the Home Farm. He still retained his lodgings in London, and visited them occasionally. There were no debts contracted at Maldon, and the insolvent paid for his lodgings there as they became due. He had only described himself as of his lodgings in London.

*Dowse* submitted the omission of the residence at Maldon was fatal.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Dec. 4.

Where an insolvent fails to describe himself as of all the places where he has resided during the six months immediately preceding the filing of his petition, the petition will be dismissed.

MR. COMMISSIONER PHILLIPS. The Act permits no amendment in a petition, and it must be dismissed.

Attorney: *Daniel*.

Judgment.

## RE THOMAS CHANCE.

Before MR. COMMISSIONER MURPHY.

**T**HE insolvent, who described himself as a cheesemonger, had petitioned the Court as a trader owing less than 300*l*. It appeared from the evidence, that before the filing of his petition he had agreed in writing, with several of his creditors, to pay

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Dec. 6.

Where several of the creditors of an insolvent had accepted a composition

1854.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE CHANCE.

in satisfaction of their debts, and had signed receipts and an agreement accordingly.—*Held*, as no release under seal had been executed the difference between the composition paid and the amount of the debts originally owing must be taken into consideration in estimating the insolvent's liabilities, and, as the whole exceeded 300*l.*, the petition was dismissed.

them a composition in satisfaction of their debts, and they on receiving the respective amounts had given him receipts in accordance with the terms of the agreement. No release under seal had been executed, and it was objected by *Sargood*, on behalf of the opposing creditor, that as no valid release had been executed the difference between the composition paid and the sum compounded for must be taken into consideration in estimating the amount of the insolvent's debts; and as the difference would carry the debts beyond 300*l.* the Court had no jurisdiction, and the petition must be dismissed.

*Dowse*, for the insolvent, said the true test to apply to the question was, could the creditors who had accepted the composition in full satisfaction of their debts sue the insolvent successfully for the difference? It was contended the receipts they had given and the agreement they had signed would be a good answer to any actions they might bring on account of the difference.

MR. COMMISSIONER MURPHY. I am afraid there is no help for the petition. No doubt, the intention was to discharge the insolvent from all further liability on account of the debts compounded for, but no legal document in the shape of a release has been executed, and the difference must be taken into consideration. I regret the Court has no jurisdiction. It is clear it has not, and the petition must be dismissed.

Attorney: *Sorrell*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Dec. 12.

## RE WILLIAM FERM CASTLE.

Before MR. COMMISSIONER MURPHY.

Sect. 9. of 7 & 8  
Vict. c. 96. en-  
acts, *inter alia*,  
“that the  
wearing ap-  
parel, bedding,  
and other ne-  
cessaries of the  
petitioner and  
his family, and  
the working  
tools and im-  
plements of  
the petitioner,  
not exceeding  
in the whole the  
value of 20*l.*,

may be excepted by the petitioner from the operation of the Act.” A publican having petitioned was allowed by the broker to the Court under this section a beer-engine, counter and other fixtures, which the auctioneer to the Court subsequently removed for the benefit of creditors: *Held*, that the auctioneer was justified in so doing, the articles not being within the meaning of the above section.

THE insolvent, a publican, had petitioned the Court under the protection statutes. It appeared that before the filing of the petition the landlord of the premises occupied by the insolvent had levied a distress for arrears of rent, under which the greater portion of his furniture had been seized and sold. Subsequently to the filing of his petition, the broker to the Court had valued his excepted articles, and allowed him, amongst other things, a beer-engine, counter, and other fixtures, of the value of 14*l.*, which the auctioneer to the Court afterwards removed for the benefit of creditors. On the occasion of the insolvent's examina-

tion, he complained of the auctioneer's proceedings, and requested that the articles so allowed him, and afterwards removed, should either be restored or their value paid to him; whereupon the case was adjourned for the attendance of the auctioneer, who stated he did not consider the articles to be within the exceptions allowed by law, and therefore he had removed them for the benefit of creditors; and, moreover, he suspected a collusion between the insolvent and his landlord, with regard to the distress, which occurred in more than sixty per cent. of the cases that came before the Court.

1864.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
RE CASTLE.

MR. COMMISSIONER MURPHY said the auctioneer was quite justified in securing, for the benefit of creditors, the beer-engine, counter, and other fixtures that had been valued by the broker in the category of excepted articles. What he understood by that term was, firstly, the wearing apparel of the insolvent, his wife, and his children; secondly, his bed and bedding; thirdly, articles, such as chairs and tables, which were necessities for his household; and if then there was a margin between the value of these things and the 20*l.* allowed by the Legislature, the insolvent would be entitled to his working tools, — such, for instance, as a carpenter to his basket of tools, or a blacksmith to his anvil-bag; but if a publican were allowed such a thing as a beer-engine or a counter, on the same principle an engineer would be entitled to retain a steam-engine, if of less value than 20*l.* Moreover, he could not help thinking there was some connivance between the landlord and the insolvent, respecting the distress; and he should make no order in the case.

*Judgment.*

Application refused.

Attorney: *Marshall.*

## RE WILLIAM LEE.

Before MR. COMMISSIONER MURPHY.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
Dec. 6.

**SARGOOD** moved for the discharge of the insolvent from Whitecross Street prison. From the affidavit of the insolvent it appeared he had been engaged as a builder in Houndsditch. On the 1st of December he had filed a petition and schedule under the protection statutes; on the following day, at about one o'clock, an interim order for protection from process was issued, the same to remain in force until the 14th of the following February, that being the day appointed for his first ex-

Where an insolvent is arrested by a creditor (whose debt is inserted in the schedule) after the filing of his petition and schedule, and the issue of the interim order, but before it reaches him, this Court will order a discharge.

1854.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE WILLIAM  
LEE.

amination. At half-past two o'clock on the 2nd of December, and before the interim order had reached him, he was taken into execution at the suit of a creditor, on account of a debt which was set out in the schedule, and forthwith conveyed to the Debtor's Prison for London and Middlesex. The case was analogous to *Re James Killingsworth* (a), where a similar application had been made and granted.

*Judgment.*

MR. COMMISSIONER MURPHY, after referring to the case cited, directed a discharge to issue.

(a) *Macrae's Practice*, 256.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Jan. 16. 1855.

In estimating the amount of a trader's debts under the protection statutes, debts owing in former insolvencies, under 1 & 2 Vict. c. 110., will not be taken into consideration.

*Argument.*

## RE BENJAMIN ARCHER.

Before MR. COMMISSIONER MURPHY.

THE insolvent, who described himself as a plumber and glazier, appeared on his interim order, supported by *Sargood*.

In 1841, and again in 1844, he had been discharged under 1 & 2 Vict. c. 110., and the debts under those insolvencies amounted to 490*l*. He now appeared under the protection statutes, owing debts to the amount of 275*l*. 5*s*. 7*d*.

*Reed*, for the opposing creditor, called attention to these facts, and submitted the Court had no jurisdiction. The Act of Parliament limited the amount of a trader's debts to 300*l*., and as the effect of the former insolvencies was only to bar the ordinary legal remedies, and not to extinguish the debts then owing, the 490*l*. must be taken into consideration. The point was not a new one; it had been frequently discussed, and first determined in *Re J. Bohn*, and *Re David Brakenbridge* (b): there the late Chief Commissioner had delivered a written judgment, declaring that such debts must be taken into account, and that doctrine was exemplified by a variety of subsequent decisions collected in *Macrae's Practice*, 94. It might be urged, on the other side, that the present Chief Commissioner entertained a different opinion, and *Re Hance* (c) would no doubt be cited; but giving to his judgment all the weight to which it was so justly entitled, still, the majority of Commissioners presiding in insolvency had otherwise decided.

*Judgment.*

MR. COMMISSIONER MURPHY said the debts inserted in the insolvent's former schedules could not be recovered by ordinary legal process; in fact, all individual suit for their recovery was

(b) *Macrae's Practice*, 190.

(c) 11 L. T. 373—436.

prohibited: the insolvent did not ask for protection as far as those debts were concerned, but only on account of debts subsequently contracted. He quite agreed with the opinion expressed by the learned Chief Commissioner, and the petition would be sustained.

Objection overruled.

Attorneys: *Wright & Dodd; Marshall.*

1855.  
RE BENJAMIN  
ARCHER.

## RE GEORGE TAYLOR BROWN.

Before MR. COMMISSIONER MURPHY.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
Jan. 17.

THE insolvent, who applied to be discharged on sureties, was opposed by the attorney for a creditor who complained of a vexatious defence to an action.

Where, on an application for a discharge on sureties, no ground for a remand appears on the face of the proceedings, the Court will not receive evidence of an alleged offence, but will grant the indulgence of a discharge on bail.

*Reed*, on behalf of the insolvent, objected to the opposition, and observed the principle laid down by the Court was, that it would rather extend than diminish the indulgence of bail, *Re Lyons* (a); and unless a clear case for a remand was patent upon the proceedings, the Court would not deprive an insolvent of a privilege which the Act of Parliament had clearly given: *Re Weston*. (b) If the opposing creditor had a complaint to make, he would have an opportunity of proving it by evidence when the insolvent came up to be heard; but at this period of the case it was not to be expected that he should be prepared with his answer.

MR. COMMISSIONER MURPHY said that no doubt a vexatious defence to an action, if admitted, or if it could be proved in the first instance so as to admit of no explanation, would be a sufficient objection to the granting of bail; but at this stage of the proceedings the simple fact that he had to try was whether any matter appeared which disentitled the insolvent to the indulgence he prayed. He took it, the rule was the same as at Common Law, where a misdemeanour had been committed, the offender was entitled to bail *ex debito justitiæ*. The statute provided (c) "it shall be lawful for the said Court for the Relief of Insolvent Debtors, if such Court shall think fit so to do, and on such notice to the detaining creditor or creditors of such insolvent as the said Court shall deem proper, to direct such insolvent to be discharged out of custody on his finding two sufficient sureties," &c. He took it the words, "*it shall be lawful*," was a direction that a man should be bailed; and unless it could be

*Judgment.*

(a) 1 Bank. & Insolv. Rep. 268.

(c) 1 & 2 Vict. c. 110. s. 38.

(b) Ibid. 281.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE GEORGE  
TAYLOR  
BROWN.

*Judgment.*

shown that a man admitted a fraud or a vexatious defence, or other ground for remand upon the face of the proceedings, the Court was bound to admit him to bail. It might appear in this case that the insolvent had given no directions to his attorney to defend the action; or that he had misconceived his rights; or that there was some legal flaw in the proceedings. In all of which cases he would justify his conduct; and it was open to him to show such a justification at the hearing, until which time the Court would admit him to bail.

Attorney: *Strong.*

COURT OF  
BANKRUPTCY.  
*Jan. 23.*

The Court of Bankruptcy has no power to discharge from custody a bankrupt committed to prison by the City Small Debts Court for nonpayment of a judgment debt, although the bankrupt had obtained protection previous to the committal.

*Judgment.*

## IN RE AUSTIN.

Before MR. COMMISSIONER FONBLANQUE.

THE bankrupt, after having obtained his protection, was committed to prison for contempt of the City Small Debts Court, for not having paid a sum of money, for which judgment had been obtained against him. This was an application for his discharge from custody.

Mr. *Chidley* (solicitor) for the bankrupt, relied on the statute, sect. 112. (a), and cited *Wall v. Atkinson* (b), *Re M<sup>r</sup> Williams* (c), *Ex parte Jeyes* (d), *Ex parte Helsby*. (e)

Mr. *Goddard* (solicitor) for the detaining creditors, referred to the City Small Debts Act. (f)

MR. COMMISSIONER FONBLANQUE was of opinion that the statute relied upon by the detaining creditor took away the general jurisdiction of this Court to give effect to its order for protection.

Solicitors: *Chidley* and *Goddard*.

(a) 12 & 13 Vict. c. 106.

(b) 2 Rose, 196.

(c) 1 Scho. & Lef. 169.

(d) 1 Dea. & Ch. 764.

(e) 1 Dea & Ch. 16.

(f) 15 Vict. c. 77. s. 87. Parties having obtained an unsatisfied judgment may obtain a summons. Sect. 89. (*inter alia*). "If it shall appear that the party summoned has then, or has had since the judgment obtained against him, sufficient means or ability to pay the debt, damages, or costs so recovered against him, either altogether or by instalments, which the Court in which the judgment was obtained shall have ordered, and if he refuse or neglect to pay the same as shall have been so ordered, or as shall be ordered, pursuant to the powers hereinafter provided, it shall be lawful for the

Judge, if he shall think fit, to order that any such party may be committed to some gaol or house of correction of the county, district, or place in which the party summoned is resident, or to some gaol or house of correction, or other prison within or for the city of London or the liberties thereof, for any period not exceeding forty days." Sect. 92. provides that imprisonment under the warrant shall not satisfy the debt. Sect. 94. directs the mode of issuing and executing warrants of commitment, and enacts that "no protection, order, or certificate granted by any Court of Bankruptcy or for the Relief of Insolvent Debtors shall be available to discharge any defendant from any commitment under such last-mentioned order."



EXPARTE LITTLEDALÉ AND MILDRED, IN RE  
PEARSE.Before MR. COMMISSIONER GOULBURN. FONBLANQUE, *ad-juvante*.

1854.

COURT OF  
BANKRUPTCY.

Dec. 11.

THIS matter came before Mr. Commissioner *Goulburn* on the 11th November last on motion; when it appeared that there were special circumstances in the case. The Court was then pleased to order that a petition should be filed. (a) The petition was accordingly filed, and came on for hearing this day.

The petition of Henry Littledale stated that in April 1846 Littledale lent to the bankrupt 2500*l.* on the security of a bond dated the 14th of April 1846, for the sum of 5000*l.* conditional on the payment of 2500*l.* with interest at 5 per cent. per annum on the 1st of October 1846, and upon an agreement for an assignment by way of mortgage thereafter mentioned.

That by an indenture of the 14th of August 1846, made between the bankrupt of the one part and Littledale of the other part, after reciting that the bankrupt was absolutely possessed of 2000*l.* East and West India Dock stock and 1000*l.* Imperial Fire Insurance stock, standing in his name in the books of the respective companies, and that on the bankrupt's request Littledale had agreed to advance to him 2500*l.* on the security of an assignment of those stocks, it was witnessed that in consideration of the above sum having been lent to him, the bankrupt did grant, &c. to the petitioner, &c. "all those said sums of 2000*l.* East and West India Dock stock and 1000*l.* Imperial Fire Insurance stock, and the dividends, interest, and annual produce thereof," and all right, &c. at Law and Equity in the same; to hold the stocks, and subject to a proviso for redemption: and the bankrupt gave to the petitioner, &c. power to sell the stock and receive the dividends, and to use his name, and did confirm all acts of the petitioner in all matters relating to such stocks. The proviso for redemption was for payment of 2500*l.* on the 1st of October then next, and in the meantime of interest at 5 per cent. by equal half-yearly payments, in which case the assignment should determine and be void. But in default of such payments, in one month after notice demanding payment should have been given to the bankrupt, it should be lawful for Littledale to sell the stocks and to retain the purchase money upon trust to repay himself the principal mortgage money and interest, and to pay the surplus to the bank-

The bankrupt was a shareholder and director of the East and West India Dock and Imperial Fire Insurance Companies. Long prior to the adjudication he assigned by deed to the petitioner his shares and interest in those companies to secure an advance of 2000*l.* The assignment was not entered in the books of either company, as required by their respective rules; and no notice was given to either company until immediately before the bankruptcy, the petitioner being unwilling to deprive the bankrupt of his qualification as a director; but upon its becoming known that bankruptcy was inevitable, and a few days before the act of bankruptcy was committed, the petitioner gave notice of the assignment to both companies. —

*Held*, that the

(a) General Rules and Orders, Nos. 17, 18, 20, and 28.

shares were in the order and disposition of the bankrupt, and passed to the assignees.

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*Statement.*

rupt, &c. The deed contained a covenant against sale by the bankrupt and other covenants usual in such assignments. That at the date of the assignment the bankrupt was a director of the East and West India Dock Companies and also of the Imperial Fire Insurance Company. On the 9th of June 1854, Littledale gave the following notice to the directors of the dock companies: "Gentlemen, I beg to apprise you that Mr. Henry Pearse has assigned to me 2000*l.* East and West India Dock stock standing in his name, and I desire you to hold the same subject to my order." On the same day Littledale gave notice in similar terms to the directors of the Imperial Fire Insurance Company. At the time when such notices were given the bankrupt had not committed any act of bankruptcy. On the 14th of June the bankrupt signed a declaration of insolvency, which was filed on the same day, and was the act of bankruptcy (*a*) upon which the adjudication was founded, on a petition filed on the 17th of June 1854. That the capital of the Imperial Fire Insurance Company is not represented by stock but by shares of 500*l.*, on each of which 50*l.* only has been paid up. The bankrupt was at the time when he executed the assignment, and also when he was adjudicated a bankrupt, a registered proprietor of six of such shares, and that he never had a greater or less number of such shares, and that at the date of the execution of the assignment it was understood and intended both by the bankrupt and Littledale, that the assignment of 1000*l.* Imperial Fire Insurance stock should be in fact (and as Littledale is advised is) an assignment of such six shares. That the 2000*l.* East and West India Dock stock remained standing in the name of the bankrupt up to the time of the adjudication. That 2500*l.*, together with arrears of interest from the 1st of October 1853, is still due to Littledale.

The petition prayed that Littledale might be declared mortgagee of the dock and fire insurance stocks, and for the usual order for account and sale.

Littledale, in his affidavit, proved the facts set forth in the petition. Mr. *Freshfield*, being now the solicitor for the assignees, but formerly the solicitor for Littledale, made an affidavit to the following effect; viz., That at the end of May and beginning of June last, he was consulted by the bankrupt and his friends on his affairs, and was informed by the bankrupt that proceedings at law were pending against him to recover 2000*l.* or thereabouts, which he could not pay; that he owed other large debts beyond his means, and that it must therefore be decided whether his friends would assist him and provide the

(*a*) 12 & 13 Vict. c. 108. s. 70.

funds for liquidating his debts, as otherwise he must declare himself a bankrupt. On the 9th of June last a meeting was held, at which Charles Pearse, the bankrupt's brother, and Littledale were present, when the affairs of the bankrupt were fully discussed. Littledale at that time wished to defer giving notice of his securities to the respective companies, in order that the bankrupt might retain his position as a director in those companies; but on the result of the meeting, when it was decided that it was not possible to avoid bankruptcy, he, on the same day, gave notice of his claim as assignee of such shares to the respective companies.

The bankrupt, by affidavit, supported the statements in the petition as far as he was concerned.

There was no contest as to the facts.

*Bagley*, for petitioner. Mr. Littledale is entitled to the usual mortgagee's order, notice having been given to the respective companies before the act of bankruptcy. It may be argued, on the other side, that the deed conveyed no interest, as by the rules of the companies, certain things were omitted to be done which were necessary to give effect to the transfer (a), and that the shares remain in the order and disposition of the bankrupt. But the petitioner has an equity arising out of his agreement made for a good consideration and *bonâ fide*; and by giving notice of that agreement, he has done all that was in his power to obtain a legal interest in the shares prior to the act of bankruptcy.

As to the insurance company, it may be assumed that there are provisions in their deed of settlement regulating the mode of transfer of shares, though the deed ought to be produced on the other side.

In *Ex parte Masterman* (b) it was held that a transferee of shares, having given notice of his transfer to the company, was an equitable mortgagee of the shares, although the rules were not complied with, to effect a complete transfer, and that where such notice was given before an act of bankruptcy by the assignor, the shares did not pass to the assignees as being in the apparent ownership of the bankrupt. The case was distinguished from those in which fraud was contemplated. The principles in that case are strictly applicable to the present.

The notice of assignment by the petitioner is sufficient to take the shares out of order and disposition, notwithstanding that Mr. Pearse was then known to be in difficulties; it is sufficient if the notice be given one hour before the act of bankruptcy,

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(a) See judgment, p. 28. note (a).

(b) 4 Dea. & Ch. 751.

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*Argument.*

although at the time bankruptcy is inevitable: *Exparte Majoribanks.* (a)

*Coleridge*, for assignees. (b) The notice would be of no avail unless the original assignment were valid; but with regard to the dock companies, the assignment was clearly void, being inconsistent (as is admitted) with the companies' Acts. (c)

The bankrupt was a director of the East and West India Dock Companies; by the Acts of those companies it is enacted that the directors must be in absolute and legal possession of a certain number of shares. On the assignment of all his shares, the bankrupt was permitted by the petitioner to retain his office of director; and notice of the transfer was not given to the companies until it was ascertained that bankruptcy was inevitable, in order that the bankrupt might not lose his office of director. It is not now for the petitioner to contradict his own act by contending that the transfer was effectual, or that he had done enough to take the order and disposition in the shares out of the bankrupt. This case differs from a mortgage of land, for there the mortgage itself is a transfer of the land.

Suppose the bankrupt had sold and sufficiently assigned to a second *bond fide* purchaser, for valuable consideration, behind the back of the petitioner, can it be doubted that the second transferee would not have been absolutely entitled to the shares, whatever remedy the petitioner might have had against the bankrupt? The questions as to reputed ownership have been thus tested: *Spyres v. Thompson.* (d)

In the *Queen v. Wing* (e) a proper transfer had been made.

*Bagley*, in reply. The petitioner ought to have his assignment enforced, as an equity existed long before the embarrassed state of the bankrupt's affairs commenced. The bankrupt being a director, the company was affected with notice of the circumstances within his knowledge. There was no impropriety in permitting the bankrupt to remain a director and enjoy the fruits of his property until default should be made in payment of the mortgage money; but all that could be done by the petitioner to gain legal interest in the shares was done previous to the act of bankruptcy, so as to bring him within the protection of the Bankrupt Law Consolidation A c. (f)

Dec. 30.

MR. COMMISSIONER FONBLANQUE did not sit.

(a) 1 De G. 486.

(b) See Mr. Freshfield's affidavit, *suprà*, p. 24.

(c) See judgment, p. 28. note (a).

(d) 13 Sim. 469.

(e) 17 Q. B. 645.

(f) 12 & 13 Vict. c. 106. s. 133.

MR. COMMISSIONER GOULBURN, after reading the petition, said: I need not go through the affidavits in detail, as they merely verify the allegations in the petition, except that of Mr. Freshfield, which, though very short, contains most important matter. It appears that Mr. Freshfield was consulted about the end of May or the beginning of June, by the bankrupt and his friends about his affairs. Mr. Freshfield says he was informed by the bankrupt that proceedings at law were pending against him to recover a sum of 2000*l.*, or thereabouts, which he could not pay; that he owed other very large debts beyond his means of payment, and it must be decided whether his friends would assist him, as otherwise he must declare himself a bankrupt. Whence it appears that bankruptcy was then in contemplation and imminent. On the 9th of June (the day on which the notice was given) a meeting was held, at which the bankrupt was not present; but his brother, Mr. Charles Pearse, was, as well as the petitioner, when the affairs of the bankrupt were fully discussed. This goes a good way to prove what object the petitioner had in view, having taken no steps whatever to carry into effect the transfer of shares beyond merely receiving the deed of assignment. Mr. Freshfield says that even on this day, when bankruptcy was resolved upon, the petitioner wished to defer giving notice of the security he held, in order that the bankrupt might retain his position of a director in the companies, which he could not have done if notice had been given. Thus the bankrupt was enabled, by means of a secret assignment, to hold himself out to the world clothed with the character of a director of and a proprietor of shares to a large amount in important companies, which he could not have done if the assignment had been of sufficient force to divest him of the shares. The act of bankruptcy was committed on the 14th of the same month, but bankruptcy had been resolved upon at the meeting, and though the notices were given five days prior to the act of bankruptcy, yet it had been determined that bankruptcy was inevitable. That is the point I want to press. It has been attempted at the bar to assimilate the assignment of these shares to an equitable mortgage, though nothing was actually transferred; to assent to this view would be to extend the doctrine of equitable mortgages to a dangerous extent.

The principles applicable to this case are to be found in *Ex parte Masterman*, viz., that where a party covenants that he will do a thing, a Court of Equity, if he has received a good consideration, will compel him to do what he ought in conscience to have done, provided that there is no sufficient remedy at Law; that after bankruptcy or insolvency the remedy at Law being

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IN RE PEARSE.

*Judgment.*

taken away, the Courts of Equity obtained jurisdiction, though it had previously been the doctrine of Equity not to decree specific performance in cases of mere chattel interests.

Now, in order to test the petitioner's right to specific performance, I must consider whether any interest in the shares passed to the petitioner by an assignment expressly contravening the provisions of the public Acts of Parliament, by virtue of which the companies were constituted.

These Acts of Parliament require that certain forms of transfer must be gone through in order to transfer stock; that there must be certain qualifications for a director, viz., that he must be a proprietor of so many shares in his own right, and not as a trustee; and that he must swear to having those shares. (a)

Before commenting upon *Ex parte Masterman*, so much relied upon by Mr. Bagley, I think it desirable to refer to *Ex parte The Lancaster Canal Company* (b), a case fully discussed before several Courts. There, where a company was formed under an Act of Parliament for the purchase of land to make a canal, it was declared that the shares should be personal estate, and transmissible as such; and the Act prescribed that certain forms should be gone through in order effectually to transfer the shares. The question was, whether those forms, not having been complied with, there was a valid transfer, or whether the property in the shares, in the case of bankruptcy, did not pass to the assignees of the original proprietor; and the ruling of the Court was, that unless the forms were strictly complied with, the shares remained in the order and disposition of the vendor, and, in case of bankruptcy, passed to his assignees, — the transfer, such as it was, not creating an equitable mortgage.

In *Ex parte Masterman*, the judgment is materially affected by the fact that notice of the transfer was given to the company, and that at an early period, in fact, immediately after the execution of the deed of transfer, and an entry of that circumstance made in their books. This, I think, distinguishes that case from the present, where, as in *Ex parte The Lancaster Canal Company*, there was no intention by the parties to alter the owner-

(a) 9 Geo. 4. c. 15. Sect. 4. Shares, &c., to be personal estate. Sect. 17. No proprietor to vote unless he will swear, if required, that he is possessed of shares, &c., in his own right six calendar months. Sect. 20. Qualification of director to be entitled to 2000*l.* stock. Sect. 44. Director reducing his stock below 2000*l.* to cease to be a director. Sect. 57. Stock to be transferred in books of the company.

1 & 2 Wm. 4. c. 52. Sect. 12.

Stock, &c., to be personal estate, to be transferred in books of company. Sect. 13. Company not to be bound by trusts without notice. Sect. 14. Assignments and transfers of stock to be registered before proprietor can vote. Sect. 20. No proprietor to vote unless possessed of stock in his own right, and not in trust. Oath as to possession may be required. Sect. 24. Qualification of director, possession of 2000*l.* stock.

(b) 1 Dea. & Ch. 411.

ship of the shares. I refer to Mr. Littledale, the petitioner's, expressed intention that the bankrupt might remain a director, and, therefore, ostensible owner; and there is no entry in the books of the company of any change of ownership. The public are deceived, and were intended so to be, and are led to believe that the bankrupt was solvent and opulent at a time when he was on the very verge of bankruptcy. I think, therefore, if I were to be guided by *Ex parte Masterman* in forming my judgment on the present case, I should be making a dangerous precedent, viz., that in any case parties might collude to defeat an Act of Parliament. I would rather follow *Bosanquet v. Shortridge (a)*, and *Reg. v. Wing*. In *Ex parte Pooley (b)*, there was an actual deposit of the certificates of shares. In *Thompson v. Spyers* it was held that notice was insufficient to alter the visible ownership of the thing assumed to be transferred. But the notice here was given immediately before, and in contemplation of bankruptcy; and if it had been an actual assignment at such a time, it would have been a fraudulent preference, and void as an act of bankruptcy. I therefore think that as to the dock companies' shares, the prayer of the petition must be refused. As to the shares in the Gas Company, the petitioner has failed to produce the company's deed; so far I am in the dark: but it appears to me that the deed of transfer conveys stock, when, in fact, there was no such thing in existence; the intention, no doubt, was to convey whatever interest the bankrupt had in the company; but that was not stock; and the notice of a transfer of stock would not have been attended to by the company. But a mere intention to transfer is not sufficient to pass property. The petition must, therefore, be dismissed, but, as the points in question seem fairly debatable, without costs.

Solicitors: *Roumieu & Walters; Freshfield & Co.*

(a) 4 Exch. 699.

But see *Ex parte Rayner*, in *Re Hom-*

(b) 2 Mont. Dea. & De G. 505. *mersham*, 1 Bank. & Insolv. Rep. 256.

## IN RE FISHER AND BASEY.

Before MR. COMMISSIONER GOULBURN.

**THIS** was a motion to release the bankrupts, who were confined in Norwich Castle for debt. The bankrupts had not surrendered, and had not obtained protection. The following notice was served on the detaining creditors:—

rendered; but the Court will order the gaoler to bring up the bankrupt to surrender, and will then order the discharge.

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BANKRUPTCY.  
Jan. 20. 1855.  
The Court  
will not  
discharge a  
bankrupt from  
custody (for  
debt) until he  
has sur-

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COURT OF  
BANKRUPTCY.

IN RE FISHER  
AND BASEY.

*Argument.*

"Take notice, that the above-named bankrupts will be brought up to the Court of Bankruptcy, Basinghall Street, in the City of London, on Wednesday next, the 24th day of January 1855, at the sittings of the Court, when an application will be made for the bankrupts' discharge from custody." (a)

*Bagley*, for the bankrupts, doubted whether the Court could grant an immediate discharge until the bankrupts should have surrendered; but asked that the Commissioner would be pleased to permit a warrant to issue to the person in whose custody the bankrupts were, to bring them up, in order that they might surrender; and prayed for leave to renew the motion of which notice had been given, after the surrender.

No objection was made by the detaining creditors; the only question being as to costs, there being as yet no estate in the hands of the official assignee.

*Judgment.*

MR. COMMISSIONER GOULBURN referred to section 112. of the statute, which, after providing for protection from arrest to bankrupts not in prison, goes on to enact, "And whenever any bankrupt is in prison or custody under any process, attachment, execution, commitment, or sentence, the Court may, by warrant directed to the person in whose custody he is confined, cause him to be brought before it at any sitting either public or private; and if he shall be desirous to surrender, he shall be so brought up, and the expense thereof shall be paid out of his estate, and such person shall be indemnified by the warrant of the Court for bringing up such bankrupt; and where any person who has been adjudged bankrupt, and has surrendered and obtained his protection from arrest, is in prison or in custody for debt at the time of his obtaining such protection, the Court may, except in the cases, order his immediate release, either absolutely, or on such conditions as it shall think fit."

His Honour was of opinion that, at the present time, he had no power to order the discharge, but that, on the costs of bringing up the bankrupt being secured (in case there should be no assets) he would grant the warrant asked for by Mr. *Bagley*.

Jun. 24.

The bankrupts were brought up this day, and, having duly surrendered, the Court was pleased to order their discharge.

Solicitors: *Sole, Turner, & Turner.*

(a) 12 & 13 Vict. c. 106. ss. 12. 112., and Rules and Orders, Nos. 17. and 26.



## RE WILLIAM KING.

Before MR. COMMISSIONER MURPHY.

THE insolvent appeared on his first examination, supported by *Dowse*.

*Sargood* opposed on behalf of two creditors, named King and Aldridge. From the evidence of a Mr. Hutson, a solicitor, it appeared that in July last the insolvent had called upon him with a bill for 50*l.*, drawn by himself, and accepted by one Newman. On being questioned who the acceptor was, he replied, a respectable wine merchant; and added, the bill was given for cigars. The witness had had some previous transactions with the insolvent, and, having no reason to doubt his integrity, had prevailed on Mr. King to discount the bill. On the 11th of October following, the bill was dishonoured, and an action commenced against the acceptor.

Mr. Aldridge, on examination, stated, in October last the insolvent was his debtor to the amount of 40*l.* 13*s.*, and on the 25th of that month he brought him a bill for 55*l.* 3*s.* 4*d.*, drawn by himself, and accepted by Newman; he represented the acceptor to be a large wine and spirit merchant, and added, the bill was as good as the Bank of England, and would sure to be honoured at maturity. Upon these representations further goods had been supplied to the amount of the difference between the bill and the debt then owing. At maturity the bill was dishonoured. The insolvent admitted that previously to the 11th of October he had never seen the acceptor. Being in want of money, he had employed a person, named Horn, to obtain an acceptance, who had returned him the bill with the name of Newman written across it, for which service he had received sixpence in the pound. He did not inquire who the acceptor was, but Horn had stated him to be a wine and spirit merchant. On Newman's being sued at the suit of King, he called upon the insolvent, when Horn informed him he must give a second acceptance in order to take up the first. He did so, and the insolvent again paid Horn sixpence in the pound on the amount of the bill. This bill was paid to Mr. Aldridge as already stated.

MR. COMMISSIONER MURPHY. No one who has heard this case can doubt that this is not only a legal, but a moral fraud, and the Court will not sustain the petition.

Petition dismissed.

Attorneys: *Sharp; Hutson; Ashton & Watts.*

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COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Dec. 13.

The insolvent having contracted debts with two opposing creditors by means of fraud and false representations, the petition was dismissed.

*Statement.*

*Judgment.*

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Jan. 24.

Where a petitioner for discharge, whose hearing was fixed for the 23rd of January, was discharged by his detaining creditor on the 21st of the same month; *Held*, that the Court had no power to adjudicate. *Semble*, the Court will adjudicate where the period between the lodging of a discharge and the time appointed for the hearing does not exceed twenty-four hours.

*Judgment.*

## RE LOUIS URBAN.

Before MR. COMMISSIONER MURPHY.

THE insolvent, a petitioner under 1 & 2 Vict. c. 110., appeared on his adjourned hearing. He had been arrested on the 20th of November, and shortly afterwards he had filed his petition. His case was gazetted for the 24th of January, but it appeared the order for hearing had issued for the 23rd, and the notices on creditors were served for that day. On Saturday, the 21st, at half-past one o'clock, a discharge had been lodged by his detaining creditor, but the insolvent had not gone out of custody. He had appeared on the 23rd, but in consequence of the notice in the *Gazette*, his case was adjourned to this day.

MR. COMMISSIONER MURPHY, on learning the above facts, said he regretted it was not within his power to adjudicate on the insolvent. A gross fraud had been practised upon him. He had been kept in prison for two months, and for the purpose of a discharge he had filed a petition and incurred a great expense as a consequence. At the last moment a discharge was lodged by his detaining creditor, and the insolvent, in point of law, was out of custody. The Act of Parliament made it imperative that a prisoner seeking a discharge should be in custody at the time of filing his petition, and during all the proceedings thereon (a): here the insolvent was discharged two days before the day fixed for the hearing of his case. He understood it was the practice of the Court to adjudicate, notwithstanding a discharge, if not more than twenty-four hours had elapsed between the time of lodging the same, and the period fixed for the hearing. He regretted the interval in this case exceeded the time allowed by the practice of the Court, and did not permit him to pronounce a discharge. (b)

Attorney: *H. Scarman.*

(a) 1 & 2 Vict. c. 110. s. 38.

(b) *Vide Re Jeffries*, 1 Bank. & Insolv. Rep. 191.

1855.

LORD  
CHANCELLOR  
AND LORDS  
JUSTICES.

Feb. 24. &amp; 28.

## EXPARTE LITTLEDALE, IN RE PEARSE.

Before THE LORD CHANCELLOR and THE LORDS JUSTICES.

THIS was an appeal from a decision of Mr. Commissioner Goulburn, reported in 2 *Bankruptcy and Insolvency Reports*, p. 23., and, with the assent of the *Lords Justices*, heard before the full Court.

The facts and circumstances of the case are given in the report below.

*Bacon* and *Bagley* (Common Law Bar) in support of the appeal. The Commissioner had been of opinion that a Court of Equity would not assist an equitable mortgagee of shares in a company who had allowed the mortgagor for several years to appear to the world as the *bonâ fide* possessor of such shares, and in respect of which as a qualification he had acted as director of such companies. This was an error. There had been a valid equitable mortgage at the time of the assignment and deposit of the shares which was perfected as against the companies by the notice in writing of such assignment given before the bankruptcy. The company had entered the receipt of this notice in their books and acted upon it. Verbal notice would have been sufficient. No fraud had been contemplated. They cited *Exparte Dillworth, re Lancashire Canal Company* (a), *Exparte Masterman* (b), *Re Styant* (c), *Exparte Pooley* (d), *The Queen v. Wing* (e), *Exparte Rayner* (g), *Fawcett v. Fearn* (h), *Price v. Groom*. (i)

*Selwyn* and *J. D. Coleridge* (Common Law Bar) for the assignees, in support of the decision below. They referred to the several clauses in the Act of Parliament incorporating the East India Dock Company, to the Act amalgamating the East India and West India Dock Companies and to the Deed of settlement of the Imperial Fire Insurance Company, and contended that by the several clauses as to the transfer of shares and stock, no valid transfer of the stock had been made by the bankrupt. The agreement entered into was only to complete the transfer, and that agreement could not be enforced in Equity. The mortgagee had

The bankrupt had been a shareholder and director of the East and West India Dock and Imperial Fire Insurance Companies. Nearly eight years prior to the adjudication, the bankrupt assigned by deed to the petitioner his shares and interest in those companies, to secure an advance of 2500*l.* The shares were never transferred to the petitioner as required by the Dock Acts and the deed of settlement of the Insurance Company, but both the Dock and Insurance Companies had notice of the assignment eight days before the commission of an act of bankruptcy by the assignor.

*Held* (reversing the decision of the COMMISSIONER) that the petitioner was to be regarded as an equitable mortgagee of the shares, and entitled to the common order for sale.

(a) 1 Dea. & Ch. 411.; S. C. Mont. & Bli. 94.

(b) 4 Dea. & Ch. 751.

(c) 2 Mont. Dea. & De G. 219.; S. C. 1 Phill. 105.

(d) 2 M. D. & De G. 50

(e) 17 Q. B. Rep. 645.

(g) 1 Bank. & Insolv. Rep. 256.

(h) 6 Q. B. Rep. 20.

(i) 2 Exch. Rep. 542.

That the shares ceased to be in the order and disposition of the bankrupt, with the consent of the true owner, as soon as notice was given to the Dock and Insurance Companies respectively.

1955.

LORD  
CHANCELLOR  
AND LORDS  
JUSTICES.

EXPARTE  
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*Argument.*

neither the legal nor equitable right to the shares and stock, and consequently no question of order and disposition could arise. The parties had acted collusively to enable the bankrupt to officiate and receive the salary as a director of these companies, which was against public policy, and a *quasi* fraud upon the shareholders and the public. The mortgagee knew that by giving notice of his incumbrance to the companies, the bankrupt would have been immediately disqualified, and this was omitted to be done intentionally in contravention of all the provisions of the Acts of Parliament, and of the spirit of those enactments. The transaction amounted to a fraudulent preference, was bad and illegal *ab initio*, and the subsequent notice was ineffectual to render it valid. They cited and relied on *Mortlock v. Buller* (a), *Bellringer v. Blagrove* (b), *Thompson v. Blackstone* (c), *Nelson v. London Assurance Company* (d), *Exparte Lawrence* (e), *Exparte Valance* (g), *Bosanquet v. Shortridge* (h), *Thompson v. Spiers*. (i)

*Bagley*, in reply. There was no evidence that the mortgagee knew that the bankrupt was a director in 1846, the date of the assignment. There was a *bonâ fide* advance of the money, which was not denied, and the bankrupt had ceased to be a director of the Dock Company eleven months before the notice. Immediately the notice was given, the shares ceased to be in the order and disposition of the bankrupt with the consent of the true owner.

*Judgment.*

THE LORD CHANCELLOR. It appears to me that this case lies in a very narrow compass. The question is, whether or not Mr. Littledale is entitled, as against the general creditors of Mr. Pearse, to certain shares in the East and West India Dock Company and in the Imperial Fire Insurance Company. There may possibly be a distinction between the two, but in the view which I have taken of the question, I consider there is none. A distinction there may be, because at the time of the bankruptcy Mr. Pearse was not a director of the East and West India Dock Company, but he was then a director of the Insurance Company; and if the question turned upon the fact of his then being a director, the case might be different as to the two kinds of shares. The important question is, however, as to the Dock shares, inasmuch as the value of the other is comparatively trifling; at the same time that would not have ab-

(a) 10 Ves. 292.

(b) 1 De G. & Sm. 63.

(c) 6 Beav. 470.

(d) 2 Si. & St. 292.

(e) 1 De G. Rep. 269.

(g) 2 Deac. 354.

(h) 4 Exch. Rep. 699.

(i) 13 Sim. 469.

solved the Court from the necessity of adjudicating; and, therefore, I feel bound to say that, in my opinion, the case does not turn upon the question as to whether he was then a director or not. I think it clear that he must be considered as not having at that time been a director of the dock company, because although it has been said that it is the custom to re-elect directors who go out of the direction under the provisions of their Act of Parliament, yet, notwithstanding that custom, it is obvious that the ex-directors have no more right to be re-elected than any other shareholders of the company. He must therefore be treated as having ceased to be a director of the company. The line of argument used may be divided into several heads: first, as to the general question which has been argued by Mr. Coleridge, that in the case of these kinds of shares, there is not, by virtue of the assignment similar to that executed in the present case, any legal or equitable right whatsoever given to the party to whom the assignment purports to have been made. The Act of Parliament provides that the transfer of these shares shall be made in a particular form only; and the argument therefore was, that the present assignment (independently of any question as to qualification or public policy) gave no right at all. I cannot yield to that argument. True it is that the Act of Parliament points out a particular mode in which transfers can properly be made, that is, legal transfers; just as, by the Common Law of the land, transfers of land can only be made by particular forms and a particular course of proceeding. There is no difference between an Act of Parliament which provides that the legal transfer shall be made in a particular way, and in a particular way only, and the doctrine of the Common Law, which prescribes that land shall be transferred in a particular way and in a particular way only. The case to which we were referred, *Ex parte Masterman*, was a case in which that point was expressly decided by the Court of Review, on the grounds stated in the judgment of Mr. Justice Erskine, then Chief Judge of the Bankruptcy Court, and which I conceive to be quite unanswerable. Therefore it must be taken that the transfer or deed in the present case only operated as an agreement to transfer. If the case on the part of the assignees rested only on that, I think such an argument would be wholly untenable. But an argument of much plausibility, if not more weight, was this: the Act of Parliament of the Dock Company and the Indenture of settlement of the Insurance Company both provide that every director, in order to fill the situation of director, must be possessed, in his own right, of a certain quantity of stock or shares in the company, and in

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that of the Dock Company it must be 2000*l*. In that company, Mr. Pearse had 2000*l*. stock, and no more; therefore it is said that when he agreed to assign that stock to Mr. Littledale by way of security, so as to give him a right as against him (Pearse), that was a fraud on the part of Mr. Littledale to let Pearse remain the apparent owner of the property; because the Act of Parliament provided that unless he were the real owner he could not be a director, and Mr. Littledale, by neglecting to give notice, so as to have the transfer legally effected, in effect enabled Mr. Pearse to appear to the world as the real owner, when in fact he was not. In the first place, although it may be certainly inferred that Mr. Littledale abstained from giving the companies notice with a view to Mr. Pearse remaining as a director, yet I do not find there was any contract of that kind — no contract that he should not give notice, and so disqualify him. What Mr. Littledale appears to have done was this, — he takes an assignment, which was not complete, so as to give him a complete equitable title, until he has given a certain notice to the company. When he has given that notice, the director would cease to possess that which he must have had in order to be a qualified director. If Mr. Littledale, therefore, had contracted not to give notice, the case might have been different; but Mr. Littledale, willing to oblige Mr. Pearse, and not looking at this transaction with the eyes with which we probably look at it in a Court of Equity, — and I agree, with Lord Justice *Knight Bruce*, that this does not impute much moral delinquency, meant only to say this, — “I shall be satisfied with getting an assignment, taking my own time to give notice.” That being so, he takes an assignment which gives him an imperfect title, but with the means in his own hands of making that title perfect whenever he may think fit so to do, and the moment he should do so he would deprive Mr. Pearse of his position of director. Having that right, he gave the notice he did on the 9th of June, and to me it appears that at that moment his title was rendered complete. The arguments directed against him have been partly derived from considerations arising upon the Bankrupt Act and partly from public policy. It has been said that directors have public duties to perform. My learned Brother suggested that, and looking at the Act of Parliament, I think it is so; and if this were a fraudulent contrivance as against that Act of Parliament, even if there had been no bankruptcy of the mortgagor this might be considered a contract which neither this Court nor a Court of Law would have recognized; but I cannot think that this was so, for the reason I point out, namely, that there was not any contract to evade the Act

of Parliament, but a contract to do something which, when complete, would be perfectly good under the Act of Parliament, the party exercising his own discretion as to the time when he should complete his title. Try the question by this test: notice was given on the 9th of June 1854; the act of bankruptcy, inchoate on the 14th, was completed on the 17th. Suppose, instead of committing an act of bankruptcy on the 14th, Mr. Pearse had died on that day, can there be the least doubt that, as against his executors, Mr. Littledale would have had a perfect title? He would not have a good title — indeed, no title at all — if the transaction had been tainted with fraud. In such a case the transaction could not have been enforced or recognized; but I assume that he clearly would have had such a title, which is one mode of arriving at the conclusion that it was not a fraud. The same question may be put in different shapes, but that appears to me to be sufficient with reference to the consideration of the case, independently of the bankruptcy. But then bankruptcy, it is said, makes a difference, because, by the operation of the Bankrupt Laws, the question of order and disposition arises. But the answer given was perfectly satisfactory, that there must be two things in order to bring a case within the clause of the Act of Parliament: the property must have been in the order and disposition of the bankrupt at the time of his bankruptcy (which I take it here would be the 17th of June, that is a time subsequent to the notice), with the consent of the true owner, that is Mr. Littledale. Now, these shares were not in the order and disposition of the bankrupt, because notice had been given to the companies some days before the act of bankruptcy took place; and whether the company had perfected Mr. Littledale's title or not, I do not think material; because if they had improperly left the shares in the order and disposition of the bankrupt by not making any entry of the notice given to them, still it cannot be said that they were in the order and disposition of the bankrupt with the consent of the true owner; for the true owner had done all that in him lay to prevent their being in the order and disposition of the bankrupt. I do not think, therefore, that the supervening bankruptcy at all alters the case. The case which was mainly relied on, the *Lancashire Canal Company's Case*, differs from the present in this material particular; there the principal question was whether the shares were real or personal estate. When it turned out to have been personal, the question was whether it was in the order and disposition of the bankrupt; and there no notice had been given up to the time of bankruptcy, and, therefore the property was in the order and disposition of the bankrupt. That case was distinguishable on that broad ground from

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the present, and, therefore, in my opinion, the judgment of the learned Commissioner was erroneous and must be reversed. The case may be rather more clear with regard to the dock shares, but, in my judgment, the principle applies equally to those, and to the fire insurance shares.

THE LORD JUSTICE KNIGHT BRUCE. With regard to the Dock shares, how this case would have stood in my opinion if Mr. Littledale had been proved to have bound or precluded himself from giving notice to the Dock Company, or its directors, or any of them, under any circumstances, I need not say. In my opinion, such a case is not proved against Mr. Littledale. I think that it ought to be inferred that, as between him and Mr. Pearse, it was to be, and in every sense always was, in the power of Mr. Littledale to give notice when he should think fit so to do; and by whatever feelings, whether of friendship, kindness, or consideration, he might have been actuated in delaying to give that notice, that view of the case seems to me not presented by the facts. Again, I need not say how the case would have stood in my judgment as to those shares if Mr. Pearse had been a director of the Dock Company in the month of June 1854, but as I understand the facts, he was not in any sense a director of that company during any portion of the month of June 1854. It seems to me, therefore, that there was nothing against public policy in the contract between these two gentlemen; and that at the time of the bankruptcy, this property was not in the order and disposition of Mr. Pearse, the bankrupt. Upon that point, therefore, I respectfully differ from the learned Commissioner. Upon the minor question (minor in point of value, and minor also otherwise) as to the Fire Insurance shares, I have considerable doubt; but as the *Lord Chancellor* and my *Lord Justice Turner* have not any doubt upon that part of the case, I requested that the decision might not be delayed (unless they should have wished it, which they did not), on account of the hesitation I feel as to that part of the case; a hesitation grounded on this, — that down to the time of the bankruptcy, and at the time of the bankruptcy, Mr. Pearse was actually, in every sense, a director of the company, which he could not have been without being the owner *bonâ fide*, really and truly of these shares. I doubt, therefore, whether this was not tantamount to a declaration to the whole world, in which Mr. Littledale must be taken to have concurred, that Mr. Pearse was the owner, in every sense, of those shares. I doubt, therefore, whether at the time of the bankruptcy with regard to the fire insurance shares, Mr. Pearse had not them in his possession by the consent and permission of Mr. Littledale, and



was consequently then the reputed owner of them. I am not sure that I have formed a definite opinion upon the point; certainly, at present, I entertain far too much doubt upon it to enable me to say that as to this part of the case I can dissent from the learned Commissioner. The united opinion, however, of the *Lord Chancellor* and *Lord Justice Turner*, of course, decides it, and the judgment must be for the appellant.

**LORD JUSTICE TURNER.** There have been several points argued in this case: first, that the agreement between Mr. Pearse and Mr. Littledale was such as could not have been enforced in a Court of Equity, independently of any question of order and disposition; secondly, that the case falls within the doctrine of order and disposition, and that these shares are to be considered to have been in the order and disposition of the bankrupt at the time of his bankruptcy; and thirdly, whether that be so or not, if they can be at all taken out of the order and disposition of the bankrupt, the case amounts to a fraudulent preference. On the third question — that of fraudulent preference — little has been said in the argument, and I think little could be said for it. I think it clear that there has been no connivance or collusion on the part of the bankrupt which could at all constitute the act of notice given by Mr. Littledale a fraudulent preference on the part of the bankrupt. The question, therefore, in my view, resolves itself into the two first points, — whether the agreement was such as could be enforced in a Court of Equity, independently of the question of order and disposition; and secondly, whether the question does fall within the section of the Bankrupt Act relative to order and disposition. As I understand the contract between the parties, it was simply this: Mr. Littledale takes a security upon the shares of Mr. Pearse, in companies of which he was a director, and he subsequently gives notice of his security. Undoubtedly, it was competent to him, upon his contract, to give notice of that security at any time when he thought proper to do so. There was no binding contract upon him in any way restraining him from giving notice at any period he thought it right. The effect of his giving that notice is at once to determine Mr. Pearse's position as a director of these companies, and therefore it seems to me that immediately upon the notice being given, or upon a bill filed in a Court of Equity against Mr. Pearse, to compel him to perfect the legal title in that property which had been equitably transferred by him by the contract between the parties, it would have been utterly out of the power of Mr. Pearse to resist the performance of that contract, and to resist the transfer of the legal property, upon the ground that

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there had been any fraudulent intention on the part of Mr. Littledale to defeat the provisions of the Bankrupt Laws. It seems to me, therefore, that the case of public policy is out of the question. I think it more out of the question as to the Dock shares, because at the period the notice was given, Mr. Pearse did not stand in the position of a director of that company; and as to the Imperial fire shares, because I do not see that that was anything more than a contract between individuals, having no reference to any question of public policy. The company is not established, as I understand it, under any Act of Parliament imposing upon the directors any duty which should render their office amenable to any of the principles of public policy. As to the Imperial shares, Mr. Pearse had, I think, ceased to be a director of that company, not at the period of the bankruptcy, but at the period when the notice was given which operated as a transfer of the shares. The question, therefore, seems to me to stand on the point of order and disposition, and the Act of Parliament says, in order to constitute a case of order and disposition, the bankrupt must, by the consent and permission of the true owner, have in his possession, order, or disposition, the goods or chattels of which he was the reputed owner. It does not seem to me that under the provisions of that part of the Act it can be said that a man is in possession of property with the consent of the true owner, when the true owner has taken every step it was in his power to take for the purpose of divesting the property out of the person who becomes bankrupt. The effect of the notice given to the companies was to take out of the power of Mr. Pearse the capacity of dealing with those shares; therefore, that is done at the instance of the person who has a security upon the shares, and who has become the true owner of them, and therefore, there cannot be said to be a holding of the possession of those shares by the bankrupt with the consent of the true owner. Some cases were cited which, perhaps, it may be material to distinguish from the present; I refer particularly to the case of *Ex parte Dillworth*, and the case of *Nelson v. The London Assurance Company*. The case *Ex parte Dillworth*, at first sight, has some bearing upon the present question, and might appear, if not carefully considered, not to be distinguishable from it; but on looking at the case, I see what Lord *Lyndhurst* said was this: — “In this case, the provisions of the Act of Parliament were not complied with; an instrument of transfer alone was executed, and that was delivered to the clerk. No duplicate was executed, nor any entry made of the execution of the transfer agreeably with the provisions of the Act of Parliament.” So

that in that case there was, as in this, no legal transfer of the shares. "No entry whatever was made indicating that Mr. Dillworth had ceased to be a proprietor, and it is quite obvious, as I collect from the transaction, that it never was intended that he should cease to be the apparent proprietor; it was intended that this should be a mere security in the hands of the company, to be made use of in default of the treasurer, and not otherwise." The intention, therefore, of the security in *Dillworth's Case* was this, — that in the event of a default being committed by the treasurer, which default had not been, and never was committed, the security should be in force. But what was the consequence? That the Lancashire Canal Company could not file a bill in Equity for the purpose of effectuating that security until a default had been committed. It would have been a fraud on the part of the Lancashire Canal Company to have set up as against Mr. Dillworth the rights under the agreement which had been entered into with them, when there had been no default on the part of Mr. Dillworth. The effect, therefore, was, that there was no charge in Equity, and there could be none upon the shares by virtue of the transaction which had taken place between Mr. Dillworth and the Lancashire Canal Company, and certainly there was none at Law. That, therefore, was a case in which the party claiming with respect to the deposit had no right either at Law or in Equity. So in the case of *Nelson v. The London Assurance Company*, also cited. There the agreement between the parties contained this provision, — "And further it was agreed that, until there should be some order or resolution of the court of directors of the company it should be lawful for each of those persons to receive their respective salaries, and the dividends upon their stock or shares, and to sell and transfer their stock and shares." Therefore, until the order and resolution of the company was made, there was no capacity on the part of those with whom the contract had been entered into, to enforce that contract in Equity. Those cases seem clearly distinguishable from the present; and I am satisfied that any decision we should arrive at, maintaining the decision of the learned Commissioner, would be very dangerous, as tending to disturb transactions which have taken place, and are constantly taking place with regard to property of this description, and that we should not be giving that effect to equitable rights which we are bound in Bankruptcy — administering both Law and Equity — to give.

THE LORD CHANCELLOR. The order, therefore, will be — the common order on an equitable mortgage as to the East and West India Dock shares, and on two shares in the Imperial

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Fire Insurance Company. The costs out of the amount of the security.

Judgment accordingly.

Attorneys: *Roumieu & Co.*; and *Freshfield & Co.*

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The mere fact of negotiating an accommodation bill does not amount to a representation that it is accepted for value.

That a bankrupt has dealt in accommodation bills is a circumstance calling for a full and satisfactory explanation; but is not necessarily a circumstance to affect him on the question of his certificate.

Every transaction of this nature is to be judged of by its circumstances, the main question being how far the bankrupt had reason to conclude that he could discharge his liability under the bills as they became due.

The Court does not, in general, favour the granting of a certificate with a condition which leaves the bankrupt's after-acquired property liable to creditors to whom he was indebted before his bankruptcy.

## EXPARTE HAMMOND, RE HAMMOND.

Before the LORDS JUSTICES.

THIS case came before the Court on a petition presented by the bankrupt by way of appeal from the decision of *W. S. Ayrton*, Esq., Commissioner of Bankrupts for the Leeds District, on the following facts:—

In June 1852 the bankrupt succeeded his father in the business of a flax-spinner. On the 27th of July 1854, finding himself in insolvent circumstances, he executed an assignment for the benefit of his creditors. Difficulties having arisen in winding up his affairs under this deed, a petition for adjudication was filed on the 3rd of August 1854, under which he was adjudged a bankrupt. He passed his last examination on the 20th of October 1854, and then applied for his certificate. The application was heard on the 27th of November, and the 19th of December, and was opposed principally on the following grounds:

First, that the bankrupt had drawn, indorsed, or accepted accommodation bills to a large amount upon or for *J. Beckenback*, *P. J. Passavant & Co.*, *T. W. Lord*, *J. M. Hirsch*, and *De Bergne*, many of which were proveable against his estate. Secondly, that he had expended an unreasonably large sum in the purchase of wines. Thirdly, that he had spent a very large sum in the purchase of paintings.

The capital with which the bankrupt commenced business amounted to between 9000*l.* and 10,000*l.* The amount of accommodation bills for which he had made himself liable during the whole course of his trading amounted to above 59,000*l.*

The amount expended in wine was about 1500*l.* The consumption appeared not to have been large, and the portion left was sold by the assignees for more than 1500*l.* The bankrupt deposed that the custom of the trade, which made it usual to invite customers, rendered it desirable for him to keep a considerable stock of wine; and he contended that the result showed that the purchase had not been improvidently made.

The sum expended in pictures, and a gallery to hold them, was stated by the bankrupt at about 15,000*l*. They were sold by him before his bankruptcy at a heavy loss, the sum realised being between 8000*l*. and 9000*l*.

The bankrupt attributed his insolvency to three circumstances. First, the heavy and unexpected loss on the sale of his pictures; a forced sale of which was necessitated by his bankers refusing to give him further credit. Secondly, the stoppage of his trade, occasioned by the bursting of a boiler at his mill, in September 1853. Thirdly, the stagnation of trade caused by the commencement of the war, which, coupled with the stoppage occasioned by the bursting of the boiler, prevented his deriving any benefit from some very expensive improvements in his mills and machinery.

On the 19th of December 1854, Mr. Commissioner *Ayrton* suspended the allowance of the certificate for two years from that day, and ordered that at the expiration of that period, a certificate of the third class should be granted to the bankrupt, but that such certificate should not discharge him from liability upon or in respect of the several bills of exchange in existence at the time of his bankruptcy, and drawn, indorsed, or accepted by him upon or for J. Beckenback, P. J. Passavant and Co., T. W. Lord, J. M. Hirsch, and De Bergne, respectively. (a)

(a) The judgment of the Commissioner, so far as related to the accommodation bills, was as follows:—But one most serious objection against the bankrupt's conduct is, that in less than two years the bankrupt has drawn or accepted and exchanged with certain confederates, accommodation bills to the following amounts: Beckenback, 18,602*l*.; Lord, 16,254*l*.; Passavant, 18,987*l*.; De Bergne, 3138*l*.; and Hirsch, 3017*l*.; making together the enormous amount of 59,998*l*.

The whole of these 59,998*l*. bills constituted a system of cross accommodation acceptance, popularly denominated kite-flying. It is scarcely possible to exaggerate the mischief done to the mercantile community by these accommodation bills. Credit is the very life of commerce, and accommodation paper poisons the sources of credit by inducing suspicion and fear, giving a false appearance of opulence and wealth, and turning out eventually a delusion and a snare. The bankrupt states that his bankers allowed him to overdraw his account 5 per cent. on the

amount of cash passed through the bank. Here is one mischief; by discounting accommodation bills he obtains false credit with his bankers, but the mischief done to the community is vastly greater. The bankrupt's conduct in regard to those bills, I consider, as desperately reckless, disgraceful to his character as a merchant, and dishonest as a man. I do not say this for the purpose of inflicting pain upon the bankrupt, but because it is my duty, sitting in this commercial court, to speak in plain terms against this shameful and dishonest system of accommodation paper. Any bankers, having the least pretensions to respectability, discovering that any of their customers dealt in accommodation bills, would insist on his instantly closing his account. Such is the opinion of bankers as to accommodation bills. And these bills are, if possible, worse than usual in Hammond's case, because, as his honest sales and purchases have amounted together to 200,000*l*., he could the more easily put this dishonest paper into circulation; he could, so to speak, slip in

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HAMMOND.*e* *Swanston and Little* for the petition.*Bacon and T. H. Terrell*, for the assignees.*De Gez*, for opposing creditors, referred to *Fentum v. Peacock* (a), *Exparte Wilson* (b), *Exparte Wakefield* (c), *Exparte Dornford* (d), *Exparte Johnson* (e), *Exparte Rufford* (g), and *Exparte Manico*. (h)*Swanston* in reply.*Judgment.*

THE LORD JUSTICE KNIGHT BRUCE said that the purchase of the wine was to be looked at in two points of view. First, did it exhibit improvidence and carelessness? Secondly, was it evidence of immoderate and extravagant habits in private life? As to the second point, it appeared that the bankrupt had lived liberally, but there were reasons connected with his business for so doing; and, considering the expediency of his inviting his trade connections, he did not appear to have kept an extravagant table. As to the first point, no case had been made out sufficient to affect the certificate. The wine had been bought with judgment; for notwithstanding the consumption, the residue produced more than the sum originally paid for the whole, and he, therefore, could not attribute to the bankrupt any gross improvidence.

As to the pictures, the bankrupt was fond of pictures, and thought he understood them. He made purchases of them to a considerable extent, not, however, merely for self-indulgence, not with a view of retaining them, but of selling them at a profit, when occasion offered. There was in this a considerable degree of imprudence, but not such as to warrant the severe sentence of the Commissioner.

There remained the question as to the accommodation bills. Unless it was to be said that by the mere act of passing a bill of exchange to a banker the customer was to be considered as declaring that it was not an accommodation bill, there was no evidence of fraud. It would be too strong to hold that the parting with a bill for value, was of itself to be deemed a representation that it was not an accommodation bill. In the present case the names on the bills were admitted to be all genuine, and to have been good names at the time. The case made against the bankrupt reduced itself then to this, that he was trading without sufficient capital, and that by dealing in accommodation

the bad bills amongst the good ones. Accommodation bills invariably lead to ruin, and accordingly, of the six confederates mentioned in the balance sheet, the bankrupt and four others are already insolvent.

(a) 5 Taunt. 192.

(b) 11 Ves. 410.

(c) 4 De G. &amp; Sm. 18.

(d) Ibid. 29.

(e) Ibid. 25., and 3 De G. M. &amp; G. 218.

(g) 2 De G. M. &amp; G. 234.

(h) 3 Ibid. 502.

bills he represented his circumstances as better than they were. The evidence did not show that the bankrupt was in such circumstances as not to be justified in continuing his trade; but for accidents in his business, and the refusal of his bankers to give him credit, he might still have been a prosperous man. As to his gaining false credit by the accommodation bills, every commercial man knew that a bill might be an accommodation bill, and if he took it without inquiring, he must be considered to be indifferent to the question whether it was an accommodation bill or not. It was not to be understood that dealings in accommodation bills were looked on with favour by the Court. On the contrary, a bankrupt who had been concerned in giving or receiving them must be prepared for a searching investigation, and expect to be called upon to give a satisfactory account of his conduct; but it was too much to say that he was to be prejudiced as to his certificate simply because he had had some dealing in accommodation bills. With all deference, therefore, to the Commissioner, it appeared that nothing more had been established against the bankrupt than a certain degree of imprudence, and the order would be that the granting of the certificate should be suspended for one year from the date of the adjudication, and that when granted it should be of the second class, and unconditional.

THE LORD JUSTICE TURNER said that there were two questions arising on the order of the Commissioner, — the condition annexed to the certificate, and the suspension of it. His Lordship, after reading the condition, said that in his judgment nothing could in general be more impolitic than the subjecting a certificate to a condition of this sort. The result of it was that the bankrupt recommenced business under a burden of debt, and the creditors, whose rights were reserved, could proceed against him, and sweep away his after-acquired property to the injury of his subsequent creditors. The object of a certificate in bankruptcy would be much defeated by such a condition. Moreover, the condition in the present case went beyond the intention of the Commissioner as expressed in his judgment. His intention appeared to be only to make the bankrupt liable to *bond fide* holders of the bills, but the condition as it stood would operate for the benefit of the assignees in bankruptcy of the persons involved in the transactions complained of, whereas it ought rather to operate for the benefit of the creditors whom the Commissioner considered to have been imposed upon by the fictitious appearance of wealth which these transactions caused. Under the circumstances of the present case, no condition ought to be annexed to the certificate.

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 HAMMOND.  
 Judgment.

Then the Commissioner had suspended the certificate for two years. The statute, as had been remarked by the *Lord Justice Knight Bruce* during the argument, enumerated a variety of offences which were to affect the granting the certificate, but did not mention dealing in accommodation bills. There might be many shades of distinction in transactions of this nature. There were cases in which both parties to an accommodation bill knew that they could not answer their liabilities under it. There were also cases where the parties knew that when the bills became due they should be able to meet them; and he thought that a decision applying one invariable rule to all cases of accommodation bills was not well founded. He had looked with some alarm on the broad principle laid down by the Commissioner as to all accommodation bills. If a person, knowing that he could meet an accommodation bill when due, raised money upon it, where was the harm? It had been urged that a person obtained false credit by circulating accommodation bills — but why? All persons knew that there were such things as accommodation bills; and bills were taken on the strength of the names attached to them, not on the faith of their not being accommodation bills. There was no more evil in it than the trading with borrowed money. If persons knew, or had good reason to believe, that they could not answer the accommodation bills they gave, then they were trading beyond their means, and their conduct became blameable.

With respect to the questions as to the wine and pictures, it certainly appeared that, upon the whole, there had been a degree of imprudence and improvidence which could not be justified, but nothing worse. The bankrupt had kept his books regularly, and had not committed any offence mentioned in the Act. The certificate would be of the second class, for he considered that the bankruptcy was in some measure, at least, to be attributed to unavoidable accidents. The Court was hardly interfering with the discretion of the Commissioner, for they thought that if he had taken the same view of the general principles relating to accommodation bills which they felt obliged to do, he would not have acted with the same severity.

Solicitors: *Courtenay*; and *Williamson & Hill*.

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1855.

LORDS  
JUSTICES.

Jan. 23. 27.

## RE WILKES, EXPARTE WILKES.

**THIS** was an appeal by Samuel Wilkes from the decision of Mr. Commissioner *Balguy*, refusing to grant a certificate that a deed of arrangement between him and his creditors had been duly signed by or on behalf of such majority of the creditors as mentioned in section 224. of the Bankrupt Act. (a) The certificate was refused on the ground that the deed was not of such a character as to come within the provisions of the Act.

The deed was expressed to be made between Wilkes of the first part, Shaw, Perry, and Gibbons of the second part, and the several persons whose names and seals, &c. being severally creditors in their own right, or in copartnership, or being agents or attorneys of creditors of the said S. Wilkes, of the third part; and the short effect of its several provisions was as follows: it recited that Wilkes was indebted to the parties thereto of the third part in the sums set opposite to their respective names; and also recited a meeting between Wilkes and his creditors, at which he represented that he could not at once pay his debts, "but that his mines, minerals, stock-in-trade, the debts owing him, and other his estate and effects at *Titford*, would, in process of time, be sufficient for that purpose;" and recited that it was agreed to give him time on the terms mentioned in the present deed. The creditors then granted to Wilkes license to carry on, manage, and wind up his mines, minerals, trade, business, and affairs for the term of three years from the 5th of October 1854, under the inspection and subject to the control of Shaw, Perry, and Gibbons, if he, Wilkes, should so long live and continue to observe on his part the agreements thereafter contained, unless the deed should become void under the proviso thereafter contained. The creditors covenanted that none of them would, during the above period, sue, arrest, prosecute, impede, or molest Wilkes in the management or carrying on of the mines, &c., or attack or intermeddle with his property; and that if any of them did so, the debt of every person so doing should be forfeited as if he had released Wilkes from it. Wilkes then covenanted with Shaw, Perry, and Gibbons, and with each of the executing creditors, to render to Shaw, Perry, and Gibbons, when required, a full account of his debts and credits, claims and demands, estate and property, and of the incumbrances thereon, and that he would, during the three years, use his best endeavours, under and subject to the direction of the

The granting a certificate by the Commissioner under section 225. of the Bankrupt Law Consolidation Act is a judicial act, and if not bound, he is, at all events, at liberty to look at the nature of the deed, and to refuse his certificate if it is not of the nature contemplated by the Act, though it has been executed by the requisite number of creditors.

Per the LORD JUSTICE TURNER, a deed of arrangement is not such as is required by the Act, unless the whole property of the debtor is unequivocally given up for the payment of his debts in all events, and not merely upon a contingency.

*Statement.*

1855.  
 LORDS  
 JUSTICES.

EX PARTE  
 WILKES.

Statement.

inspectors or any two of them, to collect, carry on, work, and get in his mines, minerals, and effects for the benefit of his *said* creditors, and would, on or before the 1st of October 1855, raise therefrom enough to pay 6s. 8d. in the pound upon the said debts of his *said several* creditors, and would pay the same unto and amongst *them his said* creditors, their respective executors, &c. rateably, and the further sum of 6s. 8d. in the pound on each of such debts on or before the 1st of October 1856, and the further sum of 6s. 8d. in the pound on each of such debts on or before the 1st of October 1857; and in the meantime, until such moneys should be so distributed, would deposit them with the Birmingham Banking Company in the joint names of the inspectors, subject to a proviso, that as long as Wilkes should observe the stipulations of the deed on his part, he should be paid 4l. per week for the maintenance of himself and family, provided sufficient profits were made. Provision was then made for the expenses of the winding up. Then came a proviso that if a dividend should be made before all the creditors of Wilkes had executed the deed, Wilkes might retain the rateable dividend of each creditor not executing, and pay it to him upon his so executing. Wilkes further covenanted not to assign, alienate, or incur any part of his property without the consent of the inspectors, and not to do anything whereby one creditor might gain an advantage over another; and "that if the said S. Wilkes shall be arrested, taken in execution, attached or otherwise, by any of his creditors, or if for any reason, cause, matter, or thing which may happen or occur to them, the said C. Shaw, F. C. Perry, and B. Gibbons, or the majority of them, then and in such case the said Shaw, Perry, and Gibbons, or the majority of them, may and are hereby empowered to enter into and upon, and seize, &c., the said mines, minerals, stock-in-trade, &c., at Titford aforesaid, as and for their own absolute property," as fully as if an absolute assignment thereof had been made to them. Power was given in certain events to a majority of the creditors to extend the period of three years for the further term of one year. Wilkes covenanted with the creditors to pay the whole of their debts within the term of three years or the extended term of four years; and that if at any time during such term or extended term the business at Titford should, in the judgment of the inspectors, become embarrassed or less adequate to answer the above purposes, or in the event of any execution, suit, proceeding, or attachment against the person or property of Wilkes, then it should be lawful for the inspectors or the majority of them, or the survivors or survivor of them,

to take possession of the property at Titford, and sell it, and distribute the proceeds among the *persons parties thereto of the third part*, rateably until they should have been paid the whole of their demands. But if the proceeds were insufficient to pay them in full, the creditors agreed to accept such proceeds in full satisfaction of their demands. The creditors covenanted to accept payment in manner provided by the deed, subject to a proviso that if Wilkes "should die or make default in the performance or observance of any of the covenants, &c., by him to be observed or performed," then all restraints imposed by the deed upon the creditors should cease, except in the case of the sale of the property by the inspectors under the above power. The deed contained a power of appointing new inspectors, and clauses for their indemnity, and a covenant by the creditors to indemnify Wilkes against all liability on outstanding bills and notes, given to any of the executing creditors. Wilkes further covenanted to assure the Titford property to the inspectors when required.

The deed contained no limitation as to the time when a creditor might come in under it, and it was executed by such a majority of the creditors as is required by section 224. of the Bankrupt Act.

It was admitted that Wilkes had some other property beside the Titford property mentioned in the deed, but it was stated on behalf of the appellant that, if necessary, he could prove that it was so mortgaged as to be worth nothing, so that practically the deed related to all his property.

*De Gex*, for the appeal.

The Court is not called upon to give a final decision whether this deed is within section 224.: it is enough if it be such as may possibly be held to come within it. All that the Commissioner has to do is to certify that the deed is executed by the proper number of creditors, not that it comes within section 224. The effect of these clauses will be much impaired if there is always to be an argument before the Commissioner as to the nature of the deed, when he is asked to certify. Unless it is wished to accelerate the operation of the deed his certificate is unnecessary. The trustees or inspectors can certify. This is against the idea that he has to regard the character of the deed. His certificate is not judicial, and gives no validity to a deed not according to the Act: *Drew v. Collins*. (a)

The present deed provides for payment of the creditors in full, and a creditor is at liberty to execute at any time. This removes the objection to the deed in *Drew v. Collins*. The

(a) 6 Exch. 670., *vide* p. 688.

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Argument.

other cases are *Tetley v. Taylor* (a), *Cooper v. Thornton* (b) *Bibby v. Larpent* (c), now under appeal to the House of Lords and *Fisher v. Bell* (d). On these authorities it is by no means clear that the deed is not within the Act, and a certificate ought to have been given, leaving the validity of the instrument to be contested at Law by any creditors who wished to dispute it.

*Willcock* and *Archibald Smith* appeared on the other side, but the Court directed the case to stand over, and they were not heard.

Judgment.  
Jan. 27.

THE LORD JUSTICE KNIGHT BRUCE said that the petitioner was an indebted trader, who sought to bring himself within sections 224. 225. of the Bankrupt Law Consolidation Act, contending that the deed he had executed was such an instrument as was pointed out by those sections. The Commissioner thought otherwise. The petitioner contended that the Commissioner was not bound to exercise and ought not to have exercised any judgment as to the nature and contents of the instrument, as it had been executed by six sevenths of the creditors. It was impossible to maintain that the Commissioner could duly or properly have made the certificate which he was asked to make, and the refusal to make which was now appealed from, while he was not satisfied that the contents of the deed brought it within section 224. The success or failure of the appeal must therefore depend on the question whether that section could or ought to be so interpreted as to bring this deed within its meaning. No attempt to construe it could be made, without reading and attending to the five sections next following. These six sections occurring in an Act containing much that was difficult, were peculiarly embarrassing and perplexing. The Court could not, on language so far from clear, ascribe to Parliament an intention grossly unjust, or hold that it meant to bind any dissenting creditor by a deed so defective, inefficient, and illusory as the present; a deed which was not a composition deed, and did not provide in any reasonable manner some effectual security or protection for the creditors.

THE LORD JUSTICE TURNER said the case had stood over for him to look into the deed, and on examining it he was satisfied it was not within the Act. He agreed with the Courts of Common Law that the whole estate must be given up in all events, and not in certain events only; in unequivocal, and not in obscure or doubtful terms. This deed

(a) 1 E. & B. 521.  
(b) *Ibid.* 544.

(c) 20 L. T. 64.  
(d) 12 C. B. 363.

did not answer these requisitions. Independently of other considerations, it was in his opinion open to doubt whether, in the event of the trader's dying within three years, the trustees of the deed could take possession of any part of the property as against his executors.

It had been argued that the Commissioner was bound to certify, as the deed had been executed by six sevenths of the creditors; but the Act made the giving the certificate a judicial act, and the Commissioner was bound to look into the deed, or if not, he was at all events, warranted in so doing. The appeal must be dismissed with costs.

Solicitors: *Church & Son*; and *W. Berry*.

1855.  
LORDS  
JUSTICES.

EX PARTE  
WILKES.

*Judgment.*

## RE EPHRAIM WATSON, EX PARTE HUMPHREYS.

Before MR. COMMISSIONER HOLROYD.

COURT OF  
BANKRUPTCY.

July 28.  
1854.

ON the 14th of July 1854, Watson, who carried on business as a shoemaker at Polstead, in Suffolk, was adjudicated bankrupt upon the petition of Isaac Humphreys. The adjudication was disputed under the Bankrupt Law Consolidation Act (*a*), on the ground that there was no sufficient petitioning creditor's debt.

It appeared, upon affidavit, that Humphreys (the petitioning creditor) brought an action of trespass against Watson in the Court of Exchequer, and, in April 1854, recovered judgment against Watson, in that action, for 95*l.* damages and costs. On the 5th of May Watson was arrested, upon a writ of *ca. sa.*, issued at the suit of Humphreys, and founded upon his judgment; and, on the 14th of May, Watson being in actual custody under such writ, petitioned the Court for the Relief of Insolvent Debtors, under the statute (*b*) for his discharge from custody. Humphreys appeared at the hearing of the insolvent's petition, on the 26th of June, and opposed the insolvent's discharge; but the Judge declared Watson entitled to his discharge, in respect of all the debts mentioned in his schedule, including the debt due to Humphreys, and Watson was accordingly discharged from custody forthwith. After such discharge, and on the 14th of July, Humphreys presented a petition for adjudication to the Court of Bankruptcy, his debt being the judgment in the Exchequer, upon which he had already taken Watson in execution.

A judgment creditor who has taken his debtor in execution is not thereby precluded from filing a petition for adjudication formed on the judgment, after the debtor's discharge under the Insolvent Act, such discharge not being with the consent of the creditors.

*Statement.*

(*a*) 12 & 13 Vict. c. 106. s. 104.

(*b*) 1 & 2 Vict. c. 110.

1854.  
COURT OF  
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RE WATSON.  
*Argument.*

The act of bankruptcy upon which the adjudication proceeded was the filing of the petition in the Court for the Relief of Insolvent Debtors. (a)

*Flather* now showed cause against the adjudication. There was no debt upon which an adjudication could be sustained. Humphreys' privilege of suing out a petition for adjudication was gone. He had made his election and arrested the bankrupt. His debt at law was gone. In *Cohen v. Cunningham* (b) it was holden that a judgment creditor who had taken his debtor in execution could not afterwards sue out a commission of bankruptcy against him upon the same debt; and that decision followed *Burnaby's* case (c), which was determined, as Lord *Kenyon* C. J. said, after much consideration.

*Bagley, contra.* The Bankrupt Law Consolidation Act and the Insolvent Debtors Act both contemplate the case of an insolvent debtor afterwards becoming bankrupt, and contain provisions expressly framed to meet such a case. (d) Every creditor of a trader committing an act of bankruptcy, provided the debt of such creditor amount to 50*l.*, is entitled to petition for adjudication. (e) To deprive Mr. Humphreys of the right to make his debtor a bankrupt, it must be contended that his debt is satisfied, but discharge under the Insolvent Law does not satisfy the debt, it only limits the remedy. *Jellis v. Mountford* (g) determined that a creditor of an insolvent, whose debt was included in the insolvent's schedule, might, after the debtor's discharge under the Insolvent Act then in operation (h), take out a commission of bankruptcy against him. It is true that in that case it does not appear that the creditor who sued out the commission had arrested the debtor, but the judgment proceeds upon the ground that the debt was still subsisting and unsatisfied. In the present case, Watson was discharged from custody by operation of law, and not by the consent of the creditor; (*Nadin v. Batty* (i), and it cannot be contended that a discharge, under such circumstances, extinguished the debt. *Cohen v. Cunningham* is clearly distinguishable, for there the debtor was actually in custody at the suit of the creditor, when the latter sued out the commission of bankruptcy. The creditor was there at the same moment pursuing distinct remedies against the person and goods of his debtor, which was objectionable. It may be doubted,

(a) 12 & 13 Vict. c. 106. s. 74.

(b) 8 T. R. 123.

(c) 1 Stra. 633.

(d) See 12 & 13 Vict. c. 106.  
s. 74. and 1 & 2 Vict. c. 110, ss. 39.  
40.

(e) 12 & 13 Vict. c. 106. ss. 89.  
91.

(g) 4 B. & Al. 256.

(h) 55 Geo. 3. c. 102.

(i) 5 East, 147.

however, whether *Cohen v. Cunningham* is now law. He also cited *Walker v. Edmondson*. (a)

*Flather* was heard in reply.

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COURT OF  
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RE WATSON.

Judgment.

MR. COMMISSIONER HOLROYD. I do not find any case precisely on all fours with the present, but upon principle and upon a consideration of the cases cited, I do not think I ought to upset the adjudication. Taking in execution upon a judgment is clearly of itself not a satisfaction of a debt. Therefore, it is every day's practice in bankruptcy to discharge a debtor in custody under an execution at the time of the bankruptcy, and to allow the judgment creditor to prove for his debt. The case of *Nadin v. Batty* establishes the distinction between a discharge by operation of law and the consent of the creditor, and I cannot hold that where a debtor gets out of custody by operation of law, and by a proceeding which may be regarded as *in invitum*, as respects the creditor, the debt is satisfied. The same point does not directly arise in this case and in *Cohen v. Cunningham*, for there, as observed by Mr. Bagley, the dates show that the debtor was actually in custody at the suit of the creditor who sued out the commission at the moment the commission issued. Upon principle, therefore, and with reference to the case of *Walker v. Edmondson*, I think myself bound to affirm the adjudication. (b)

(a) 20 Law J. 186. Q. B.

(b) A petition of appeal was presented to the Lords Justices sitting in bankruptcy, upon the hearing of which their Lordship's suggested that an action should be brought by the petitioner in order to obtain the opinion of a Court of Law upon the

question. The point was ultimately raised by a special case which was argued in the Exchequer, and decided in conformity with the above judgment.—REPORTER. The report of this decision in the Court of Exchequer will shortly appear.—ED.

## ANONYMOUS.

Before MR. COMMISSIONER FONBLANQUE.

IN this case the summons was served on the 25th of November, and made returnable on the 29th of the same month; on which day,

*Bagley* appeared for the defendant, and objected that the return of the summons was irregular; he relied on the General Rules and Orders (c), and on the interpretation clause of the Consolidation Act (d); his client ought to have four clear days, at least, to meet the summons.

(c) Nos. 1. and 76.

(d) 12 & 13 Vict. c. 106. s. 276.

COURT OF  
BANKRUPTCY.

Dec. 6.

A trader debtor summons (12 & 13 Vict. c. 106. s. 78. *et seq.*) must be served four days at least before the time for appearance, exclusive of the first and exclusive of the last day.

1854.

COURT OF  
BANKRUPTCY.

ANONYMOUS.

*Linklater*, solicitor for the plaintiff, submitted that the rule was complied with, and mentioned that it had been held by another Commissioner (a) that a summons made returnable on the fourth day was good.

*Judgment.*

MR. COMMISSIONER FONBLANQUE, having consulted with Mr. Commissioner *Holroyd*, this day decided that the rule must be construed in conformity with the interpretation clause of the Act on which it is founded, and that the return on the fourth day was insufficient. The summons must, therefore, be dismissed.

Summons dismissed accordingly.

Solicitors: *Deane & Co.*; *Linklater*.

(a) Not reported.

COURT OF  
BANKRUPTCY.

Jan. 2. 1855.

M., a sculptor, made designs and casts, which he desired to be executed in gutta percha, prior to having them coated with metal. For that purpose he delivered them to T., who found the materials and labour. The work was carried on in a portion of the bankrupt's premises, divided from that used by himself. The figures were cast in gutta percha, and were worked on by men employed by T. and by M. at the same time.

*Held*, that T. had a lien on those which were unfinished at the time of the bankruptcy.

## EXPARTE THORNE, IN RE MONTI.

Before MR. COMMISSIONER FONBLANQUE.

THIS was a question submitted to the Court under the following circumstances:—The bankrupt, who is a sculptor, was employed by the Crystal Palace Company to design a number of figures, and to execute the same in metal by means of a chemical process; for this purpose he made sketches and drawings, and afterwards moulded a number of figures, casts of which in plaister of Paris, were made at his expense, and the process of coating the casts with metal was commenced, but it did not in the first instance prove successful. While the bankrupt was endeavouring to improve his process, Mr. Thorne, the claimant, showed to him some figures cast in gutta percha, coated with copper, of which the bankrupt highly approved, and agreed with Mr. Thorne that the latter should make casts of the Crystal Palace Company's figures in gutta percha: for this purpose the plaister of Paris casts were sent to Mr. Thorne's premises at Pimlico, but as the work could not be conveniently carried on there, they were sent back to premises belonging to the bankrupt, in Princess Street, and placed in a portion of a large room partitioned off expressly for them; the other part of the same room was occupied by a Mr. Johnson, who was employed by the bankrupt in carrying on the chemical process necessary for coating the gutta percha casts with metal after they should have been completed by Mr. Thorne. The two compartments of the



large room were entered by separate doors, and one part was called Thorne's shop, and the other Johnson's shop. Mr. Thorne provided the labour and materials for carrying on his portion of the process, and kept the key of his shop, and gave orders that no one should be admitted, not wishing the process (which was a secret) to be made public. The bankrupt paid the rent of the premises, and the key of the entrance door was kept by one of his workmen. After the figures were cast, it became necessary to do further work upon them by adding to them pieces of gutta percha here and there where the moulds were imperfect, and joining separate pieces together where the whole figure could not be cast in one piece; this was done partly by Mr. Thorne's workmen, and partly by those of the bankrupt: the former giving the pieces and making the necessary additions in material, and the latter working as artists to finish off the figures, and to preserve their correctness. The figures, when thus finished in gutta percha, had to undergo other processes before they were fit for the chemical process for covering them with metal, which was carried on by Mr. Johnson; for this purpose they were taken backwards and forwards from Mr. Thorne's shop to Mr. Johnson's shop.

At the time of the bankruptcy, fifteen figures, more or less finished, were standing in Mr. Thorne's shop, and two, ready for the chemical process, were in Mr. Johnson's shop. Many of the figures were still unfinished in gutta percha at the time of the bankruptcy.

Mr. Thorne claimed all the figures.

*Lawrance* for the claim, contended that the figures belonged to Mr. Thorne; they were made of his materials, and at his expense; he never parted with his property in them, as they were kept under his sole control, and entirely separate from the bankrupt's property. There can be no question of order, disposition, or reputed ownership.

*Bagley* argued that even supposing the figures to be the property of Mr. Thorne, they were in the order and disposition of the bankrupt at the time of his bankruptcy. They were found in premises well known to belong to Monti; the partition was in reality no more than a screen to prevent interruption, and work was done on each of the figures by persons in the bankrupt's employment during Mr. Thorne's part of the process.

But the design which gives to the figures the greater part of their value clearly belongs to the bankrupt, so do the plaster casts, which were absolutely necessary, and without which Mr. Thorne's process could not have been carried on. Could Mr. Thorne sell the gutta percha figures without infringing

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BANKRUPTCY.

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COURT OF  
BANKRUPTCY.

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THORNE.

*Argument.*

Monti's right to the designs? Admitting that the materials are the property of Mr. Thorne, and that the labour employed on his process was paid for by him, he could have done nothing in constructing the figures without the designs and casts, which are indisputably the bankrupt's; therefore, giving Mr. Thorne all he claims, he can only establish his right, if any, to part of the property in the figures, and he has established no right to the whole. Suppose the figures to have been destroyed by fire, would not the bankrupt have been bound to pay for them?

*Judgment.*

MR. COMMISSIONER FONBLANQUE. This case appears to me to be entirely new, and one which ought to be decided upon its particular merits. It appears to me that there is in point of fact two kinds of property in the figures. The first is that of the bankrupt who designed them, and had his designs reduced to shape, and perpetuated in his casts, without which nothing could have been done by Mr. Thorne; but, on the other hand, the ultimate intention of the bankrupt to have them finished in a peculiar manner, could not have been done without Mr. Thorne's assistance. It is clear that Mr. Thorne provided the labour and materials necessary for completing the figures up to a certain point, and that they were kept sufficiently separate from the rest of the bankrupt's property. I do not think that the occasional removal of them into Johnson's shop for the purpose of being worked upon by the bankrupt's men constituted such a delivery as to deprive Mr. Thorne of his property; they must necessarily have been taken back to his shop in order to be completed in gutta percha. The case seems to me to resolve itself into one of lien, and I think, under the peculiar circumstances of this case, justice will be best done by coming to the conclusion that Mr. Thorne has a lien on such of the figures as have still to undergo any part of his process, and those sufficiently advanced as to be ready for Johnson's process, and which have been removed for that purpose, pass to the assignees.

Solicitors: *Ashurst*; and *Lawrance*.

## EXPARTE MILNER, IN RE WEBB.

Before MR. COMMISSIONER FONBLANQUE.

IN this case a proof was tendered by Mr. Miller, as executor of Mr. Baker, deceased, in whose service the bankrupt was employed to collect and account for moneys due to the business. The bankrupt was retained by the executors of Mr. Baker after his death to assist in carrying on the business.

At the same time the bankrupt was carrying on the trade of dealer in pianos.

It was subsequently discovered that the bankrupt had not accounted for a considerable sum of money received by him in respect of the business of Mr. Baker. The executors, by representing to him the serious fault he had committed, and by saying that he had made himself liable to a prosecution for embezzlement, induced the bankrupt to convey to them his stock-in-trade, &c., as a security for the moneys due to them in respect of the defalcations.

At a subsequent period the executors lent to the bankrupt other sums of money.

The stock-in-trade, &c. conveyed by the bankrupt to the executors of Mr. Baker, when realised, proved insufficient to pay the whole of the debt due to them. The proof was for the balance.

*Bagley*, for proof, stated the facts.

*Lucas*, for the assignees, contended that a felony had been committed by the bankrupt, and that no proof could be admitted till after a prosecution: *Exparte Elliot (a)*, *Exparte Jones. (b)*

The security was taken instead of part payment under a threat of criminal proceedings.

Mr. Commissioner *Fonblanque*. What evidence is there of felony? A servant may be in default without being guilty of felony.

*Lucas*. There was enough in the circumstances to establish a sufficient *prima facie* case to make it the duty of the executors to prosecute; it would not matter if the prosecution failed.

*Bagley*, in reply. The bankrupt has obtained a certificate of the second class. No charge of felony has ever been contemplated. The matter has always been treated as one of account between principal and agent: *White v. Spettigue. (c)*

1855.

COURT OF  
BANKRUPTCY.

Jan. 9.

The bankrupt, besides his trading, was employed by A. B. to collect and pay moneys. On the death of A. B., his executors discovered that the bankrupt was in default; and, after pointing out to the bankrupt that he had made himself liable to a prosecution, they induced him to convey to them his stock-in-trade, &c., as a security for the default. The security, when realised, was insufficient to pay the whole default, and on a proof being tendered for the residue, the Court would not presume that a felony had been committed, and the proof was admitted.

Argument.

(a) 2 Dea. 179.

(b) 3 Dea. &amp; Ch. 525.

(c) 13 M. &amp; W. 603.

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COURT OF  
BANKRUPTCY.  
EX PARTE  
MILNER.  
Judgment.

MR. COMMISSIONER FONBLANQUE. It does not seem to me that any case of felony has been made out, nor does it seem that a prosecution was ever really intended by the executors; for though such an event was alluded to, it was never acted upon; and the subsequent acts of the parties tend to show that they did not treat the matter as criminal. Considering the fine distinctions now existing in the law of embezzlement, there ought to be the strongest evidence that such a crime had been committed, in order to deprive parties of their right to other remedies. The doctrine "*Ex dilectu non oritur actio*," ought not to be extended. The proof must be admitted.

Solicitors: *W. Stopher*; and *W. Ring*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Jan. 6.

C., who had given a Judge's order in 1847, for the payment of a sum of money, was arrested in 1853 for a balance then owing upon the same. In 1847 the detaining creditor's attorney was T., but in 1853 L. acted for him, and obtained a vesting order against C. T. was inserted in the schedule as the attorney to the detaining creditor, and served with a copy of the order for hearing. The detaining creditor claimed notice for L.—*Held*, the notice on T. was sufficient.

## RE WILLIAM PERROTT CARTER.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, a petitioner under 1 & 2 Vict. c. 110., appeared to be heard.

*Dowse*, claimed notice on behalf of the attorneys to the detaining creditor. In 1847 the insolvent had consented to a Judge's order for the payment of 634*l.* 2*s.* 5*d.* A portion of that sum had been paid; and on the 15th of November 1853, a balance remaining due, the insolvent was arrested. In 1847, the detaining creditor's attorney was a Mr. Tucker, but since that period a change had taken place, and his professional advisers now were the Messrs. Lewis, who on the 31st of December 1853 had obtained a vesting order on behalf of their client. The insolvent was bound, according to the practice of the Court, to serve a copy of the order for hearing upon the detaining creditor, and also upon his attorneys. The Messrs. Lewis had not been served, and consequently the rule of the Court had not been complied with.

*Reed*, for the insolvent, contended the rule of the Court had been substantially followed. The object of exacting a double service with respect to a detaining creditor was, that the attorney who had been actively employed in directing the arrest, and to whom the client had entrusted his interests, should have every notice of the debtor's intention to get out of prison, and also to guard against collusion. Here the foundation of the present application was well known to the detaining creditor, and also to his present attorney, it being their own proceeding, and it could not be pretended the creditor was ignorant of the consequence of his own act. He had been duly served, and also the late attor-

ney, Mr. Tucker. The phraseology of the twentieth rule was peculiar,—“Also upon the attorney or agent of every detaining creditor suing by attorney;” or, in other words, notice must be given to the attorney who sued. Here Tucker sued; and as he appeared in the schedule in that capacity, he had received the ordinary notice. If an insolvent was obliged to discover every change of attorney, he would be entirely at the mercy of an unprincipled and vindictive creditor.

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RELIEF  
OF INSOLVENT  
DEBTORS.  
RE CARTER.

MR. COMMISSIONER PHILLIPS. I think the twentieth rule has been substantially complied with, and the Court will not call upon the insolvent for further service.

*Judgment.*

Attorneys: Messrs. *Lewis*; *C. Mc Duff*.

### RE VALENTINE RIMELL.

Before MR. COMMISSIONER MURPHY.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
Jan. 17.

**REED** moved for a discharge to issue under the following circumstances, which were verified by affidavit. The insolvent had filed a petition under the Protection Statutes on the 16th of January. According to the ordinary practice, he would have received an interim order for protection on the following day; but in this instance a special affidavit had been annexed to the schedule as a reason for requiring immediate protection. The proceedings, in consequence, were immediately brought into Court, and whilst the protection was being signed and the insolvent in attendance to receive the order, he was arrested by a creditor whose debt was set out in the schedule, and at once conveyed to prison. The case of *Re O'Beirne (a)* was precisely analogous, and there the Court had ordered a discharge.

Where an insolvent is arrested between the hour of filing his petition and that in which he obtains the protection, signed by the Commissioner, this Court will order a discharge.

MR. COMMISSIONER MURPHY said he had no hesitation in granting the motion; and if there had been no case precisely in point, he should have ordered a discharge to issue. The insolvent was attending the Court for a lawful purpose, and he had no doubt, if he had applied to a Judge at chambers upon the same facts, he would have granted him his freedom.

*Judgment.*

Attorney: *Marshall*.

(a) Macrae's Prac. 256.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Jan. 22.

Where an insolvent is committed to prison for the nonpayment of a debt, in respect to which he is protected from process by his interim order, and the order for committal is subsequent in date to the interim order this Court will grant a discharge.

*Judgment.*

## RE J. B. ADDIS.

Before MR. COMMISSIONER MURPHY.

ON the 19th of January the insolvent had obtained an interim order for protection. In the afternoon of the same day he had appeared at the County Court holden at Southwark, in answer to a judgment summons which had been served upon him at the suit of a creditor whose debt was set out in the schedule. He had exhibited his protection to the Judge, who, notwithstanding, ordered him to be committed, and he was forthwith arrested and taken to prison.

*Sargood* now applied on an affidavit of the above facts for his discharge.

MR. COMMISSIONER MURPHY said the insolvent was committed for the nonpayment of a debt which was duly inserted in the schedule, and in respect of which he was protected from process. He should enforce the protection granted by this Court, and order a warrant to issue for an immediate discharge. (a)

Attorney: *Wright*.

(a) The same point was subsequently. Jan. 27., ruled by Mr. Commissioner *Murphy* in *Re Newry*, on the application of Duncan for the

insolvent, and by Mr. Commissioner *Phillips* on Feb. 24. on the application of Reid for the insolvent in *Re Hersey*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Jan. 23.

D. being in custody upon an attachment for contempt for the non-performance of a particular act in a suit between himself and L., the latter lodged a distinct detainer and attachment for costs. *Held*, that the costs being a debt, the lodging of a detainer distinct from the attachment for contempt gave to this Court jurisdiction to hear the case, and thereon so far as the debts were concerned. 2ndly, a case of fraud having been made against the insolvent, he having received 100*l.* as the consideration for granting a lease, and having afterwards refused to execute the same, and the costs in question having arisen on a claim in Chancery for specific performance, and the attachment in question being for nonperformance of the decree, this Court would not adjudicate until it saw what became of such attachment, and adjourned the case generally.

## RE STEPHEN DANN.

Before MR. COMMISSIONER MURPHY.

THIS insolvent petitioned under 1 & 2 Vict. c. 110.

On the 24th of September 1850 he had entered into a written agreement with the opposing creditor, Mr. Lane, in consideration of the sum of 100*l.*, to execute to him a lease of certain premises for a term of fourteen years. Shortly after the agreement had been signed, the opposing creditor paid the 100*l.* and was let into possession. On the 6th of May 1852 the insolvent's solicitors had sent to the solicitors to the opposing

creditor a written agreement to the effect that the costs being a debt, the lodging of a detainer distinct from the attachment for contempt gave to this Court jurisdiction to hear the case, and thereon so far as the debts were concerned. 2ndly, a case of fraud having been made against the insolvent, he having received 100*l.* as the consideration for granting a lease, and having afterwards refused to execute the same, and the costs in question having arisen on a claim in Chancery for specific performance, and the attachment in question being for nonperformance of the decree, this Court would not adjudicate until it saw what became of such attachment, and adjourned the case generally.

creditor a draft lease for approval, but the same not being in accordance with the terms of the agreement, the objectionable parts were struck out, and the document returned. On the 24th of the same month the insolvent's solicitors had refused to agree to the proposed alterations. On the 7th of August 1852, the lease being unexecuted, a claim was filed in the Court of Chancery for specific performance, and on the 6th of May 1853 an order was made that the insolvent should execute the lease as prepared by the conveyancing counsel in rotation appointed by the Court, and pay the costs of suit. Against this order he had appealed, and the appeal was dismissed with costs. On the 2nd of November 1853 a second order was made that the insolvent should execute the lease before the 2nd of December then next ensuing, and pay the costs of the application. On the 18th the order was served and the lease tendered for execution, but the insolvent refused compliance, and an attachment issued upon which he was taken, and committed to prison on the 5th of April 1854. On the 8th he was detained by virtue of a writ of attachment returnable in the Court of Chancery to answer the Queen, &c., indorsed "By the Court, for not paying the sum of 51*l.* 4*s.* 6*d.* costs to Edward Lane, in a cause wherein the said Edward Lane is complainant and the within-named Stephen Dann is defendant."

*Sargood*, for the opposing creditor, called upon the Court to dismiss the petition. Section 35. 1 & 2 Vict. c. 110. declared in unequivocal terms the class of persons entitled to relief. Custody alone was not a qualification. There must be a custody upon process for the nonpayment of a debt, or damage, or costs, or a sum of money, or for a contempt for the nonpayment of a sum of money; but here the custody was founded upon a cause of imprisonment which was beyond the jurisdiction of the Court. It was wholly unconnected with money, and no payment by the insolvent would relieve his position: his contempt could only be purged by executing the lease, which in common honesty ought to have been executed years ago. In ascertaining the cause of detention, the Court would look only to the copy of causes annexed to the schedule, which would show the custody was for a contempt, in omitting to do a particular act; and it would be a matter of justice to adhere strictly to the insolvent's right to found a petition on such an imprisonment. The effect of sustaining the petition would be to strengthen the insolvent's contumacy, inasmuch as he would immediately go to the Court of Chancery, and say, It is not within my power to do the act you require, as I have now no title to the property in question; I have petitioned the Insolvent Court, and my

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 RELIEF  
 OF INSOLVENT  
 DEBTORS.  
 ———  
 RE DANN.  
 Statement.

Argument.

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RELIEF  
OF INSOLVENT  
DEBTORS.

RE DANN.

Argument.

rights and property are vested in the provisional assignee. And where the custody was partly pure contempt and partly a debt, the insolvent must first purge his contempt, and then petition on the debt.

*Dowse*, for the insolvent, contended the petition was well founded, and cited *Cooke's Practice*, p. 43. It was there expressly laid down that where an insolvent was in custody under an attachment for the nonperformance of some specific act or thing, although he could not upon such cause of detainer alone present a petition for relief, yet, if any other creditor should lodge a detainer against him on account of a debt, he had a right, upon such new detainer, to file a petition; and the Court would adjudicate with respect to his debts, excepting the cause of detainer, which had reference to the nonperformance of the particular act required to be done. Here there was a distinct and separate detainer on account of the costs, which, although lodged by Mr. Lane, was a good foundation for the petition.

Judgment.

MR. COMMISSIONER MURPHY said, the opposing creditor having lodged a distinct detainer on account of the costs, had entrapped himself, and given the Court jurisdiction. He had no doubt he could discharge the insolvent from his debts, but not from the contempt under the first custody. The insolvent would be remanded for fraud, but the case would be adjourned for consideration, and to see what course would be taken by the Lord Chancellor upon the question of contempt.

Attorneys: *J. & C. Robinson*; and *H. Scarman*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Jan. 26.

J. S. one of the partners in a firm, before leaving England for America,

placed in the care of the insolvent, the foreman in the business, his share of the partnership property, and agreed, in the event of his dying out of this country, or not being heard of, that the same should be given over to the insolvent. Upon these facts coming to the knowledge of T. S., the other partner, he stated to the insolvent that J. S. had no right thus to dispose of the partnership property, and directed him not to allow anything to be removed from the premises, which direction he promised to observe. On the following day, during the absence of T. S., he sold, as he alleged two lathes which had been brought into the firm by J. S., for 7*l.* 10*s.*, which sum he subsequently paid, over to T. S. On an action being brought by the firm for the value of the lathes, the jury gave 20*l.*, in addition to the 7*l.* 10*s.* already paid. — *Held*, the debt was contracted by a breach of trust.

## RE RICHARD STANLEY.

Before MR. COMMISSIONER MURPHY.

IN April 1853, Mr. T. Spratt, one of the opposing creditors, had purchased the business of an engineer, together with certain plant and machinery for the sum of 95*l.*, and shortly afterwards a partnership was effected with his brother, Mr. J. Spratt,



the latter bringing into the concern some tools and two lathes. Mr. T. Spratt, being otherwise engaged, was seldom on the premises, and the business was conducted by his partner, who, in March 1854, in consequence of domestic differences, suddenly left England for America. Immediately upon this fact coming to the knowledge of Mr. T. Spratt, he called at the premises, when the insolvent, who was there engaged as a foreman, produced a document, of which the following is a copy:—

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DEBTORS.

RE RICHARD  
STANLEY.

*Statement.*

“Bermondsey Street, March 29th 1854.

“I hereby agree with Richard Stanley, of 117½, Bermondsey Street, Southwark, to leave my portion of engineer's and smith's tools in his care till I return. Also the profits of the hardware shop, now situate at 116, Bermondsey Street; but if I die out of this country, or am never heard of, my portion to be given over to the above-mentioned Richard Stanley.

“Witness my hand,

“JOSEPH SPRATT.

“JOHN BAIRD, 59, Bankside.”

Mr. T. Spratt at once denied the right of his brother thus to dispose of the partnership property, and directed the insolvent not to allow anything to be removed from the premises until he received further instructions. The insolvent promised to observe this direction, and received a sovereign for the payment of current expenses. The same day Mr. T. Spratt proceeded to Portsmouth, and having there discovered his brother on board of a vessel, received from him a written authority to dispose of his share in the partnership property. Upon the return of Mr. T. Spratt to London two days after his interview with the insolvent, he found the two lathes had been disposed of during his absence, as the insolvent alleged, for 7*l.* 10*s.* Mr. Spratt valued the lathes at 35*l.*, and requested to be informed who the purchaser was, to which the insolvent replied, “a stranger.” Mr. Spratt, not crediting this statement, inquired of Baird, the witness to the document before set out, and who carried on business on a part of the same premises, if he could give him any information on the subject, to which he replied in the negative. A few days afterwards Mr. Spratt served the insolvent with a notice to leave the premises, and to deliver up all books and money in his possession belonging to the firm. With this notice the insolvent complied, and paid over to Mr. Spratt amongst other sums the 7*l.* 10*s.* alleged to have been received on the sale of the lathes, but it was then distinctly stated that the receipt of this sum was not to operate as a discharge, and that the insolvent would be held responsible in an action for the difference between their real value and the 7*l.* 10*s.* In June 1854 the

1855.  
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*Statement.*

insolvent was sued in trover by the firm, and pleaded to the action. On the cause being tried, Baird was examined on behalf of the defendant, and it was elicited in his cross-examination that he was the purchaser of the lathes, and that he had caused them to be removed from the premises to a house in the neighbourhood. The jury gave a verdict for 20*l.* beyond the 7*l.* 10*s.* already paid. The costs of the action were taxed at 75*l.* 13*s.* 6*d.*, and the insolvent was arrested on the judgment. He now petitioned the Court for his discharge under 1 & 2 Vict. c. 110.

*Argument.*

*Reed*, for the Messrs. Spratt, having called evidence and proved the above facts, asked for a remand under section 78., on the ground of a breach of trust.

*Dowse*, for the insolvent, contended that the trust must be construed according to the terms of the document which created it. The parties to that document were the insolvent and Mr. J. Spratt, and it was clear the latter had considered himself justified in withdrawing from the partnership the property which he had brought into the concern, and which, he having withdrawn, placed under the insolvent's control, to be absolutely his on the occurrence of either of two contingencies. Mr. J. Spratt was still abroad, and if a breach of trust had been committed he was the person injured. It was true the name of the firm had been used in the action, and for the purposes of the opposition, but the only complaining person substantially before the Court was Mr. T. Spratt, whose share in the partnership effects was still intact, and whose property had not been damaged.

*Judgment.*

MR. COMMISSIONER MURPHY said he had endeavoured in vain to discover a loop-hole for the insolvent, but the facts forced him to the conclusion that a gross fraud had been committed. There was a degree of suddenness about the sale that could not be accounted for. It occurred during the absence of Mr. Spratt, and, moreover, after the insolvent had been expressly directed not to allow anything to be removed from the premises. If he did sell the property, believing the price obtained to be the full value, there was no accounting for his falsehood when interrogated on the subject; and the pretended ignorance of Baird when applied to for information, presented the strongest corroborative evidence of the insolvent's dishonesty.

Remanded eight calendar months from the date of the vesting order for a breach of trust.

Attorneys: *J. Rosson*; and *H. M. Ody*.

## RE BAILEY.

Before MR. COMMISSIONER FONBLANQUE.

A PETITION for adjudication in bankruptcy was this day presented against Edward Hodges Bailey; a sculptor and member of the Royal Academy of Arts. The act of bankruptcy was a declaration of insolvency filed by Bailey, in which he described himself as a "sculptor, dealer in marble, dealer, and chapman." The deposition as to trading was as follows:— "Edgar George Papworth, of, &c., being sworn and examined, &c., on his oath saith, that he has known the said Edward Hodges Bailey for the space of five years now last past, during all which time the said Edward Hodges Bailey did use and exercise the trade and business of a sculptor and dealer in marble, and that as a sculptor he has bought marble and other materials, and worked and converted the same into busts and figures by himself and hired servants; and by selling the same so worked and converted, and by the buying of marble in the rough state and selling the same at a profit, has sought and endeavoured to obtain his livelihood thereby, as others of the same trade and business usually do."

MR. COMMISSIONER FONBLANQUE doubted whether the business of a sculptor was of itself within the meaning of the Bankrupt Law (a); but upon being satisfied that there had been frequent dealings in marble in an unworked state, and that artizans had been regularly employed in working upon the busts and figures, and paid by Bailey, his Honour was pleased to adjudicate him a bankrupt.

Solicitor: *Mahew.*

[It is within the knowledge of the Reporter that it is the custom of sculptors to employ persons to work upon the marble up to a certain state by means of a mechanical process, by which the original model is copied with more or less accuracy; the sculptor afterwards does himself what may be necessary to perfect the work. It would, therefore, seem that sculptors come within the meaning of the Bankrupt Laws.]

(a) 12 & 13 Vict. c. 106. s. 65. The general words of the section are as follows:—"All persons who either by themselves, or as agents or factors for others, seek

their living by buying and selling, or by buying or letting for hire, or by workmanship of goods or commodities, shall be deemed to be traders," &c.

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BANKRUPTCY.  
Jan. 3.

A sculptor is not a trader within the meaning of the Bankrupt Law (12 & 13 Vict. c. 106. s. 65.). But he can be made a bankrupt as a dealer in marble, and as a worker of goods and commodities.

*Statement.*

*Judgment.*

1855.

COURT OF  
BANKRUPTCY.

March 9.

Where consignors claim cargo in the possession of the assignees of the consignee (who became bankrupt during the voyage) in respect of an alleged stoppage *in transitu*, the time and manner of the stoppage must be shown.

A statement in the petition of the consignors that the stoppage took place, verified by an affidavit in general terms that the contents of the petition are true, is not sufficient.

*Statement.**Argument.*

## EXPARTE ANDORSEN, IN RE MANICO.

Before MR. COMMISSIONER EVANS.

THIS case came on on the petition of Messrs. Andersen, merchants, of Bordeaux. The facts stated, as far as they are material, are as follows: — The bankrupts, who carried on business in London, wrote to the petitioners to ship to them a cargo of brandy and wine, which the petitioners accordingly shipped and sent on the 27th of May 1852, forwarding to the bankrupts at the same time bills of lading for the cargo and bills of exchange to be accepted by them. The bills were returned to the petitioners, accepted by the bankrupts. On the 10th of June the cargo arrived in London, and was shortly afterwards warehoused in the London docks in the name of the captain of the ship.

The adjudication in bankruptcy took place on the 14th of June. The official assignee was appointed on the 15th, and assignees were chosen and appointed on the 24th of the same month respectively. The bills of lading were in the hands of the assignees at the time when the shipments arrived in London, and the bankrupts had not in any manner dealt with them. The petitioners stopped the delivery of the goods, but afterwards gave them up to the assignees to avoid litigation. They were afterwards sold for 175*l.* 15*s.*, which sum is now in the hands of the assignees. No payment has ever been made to the petitioners in respect of the bills of exchange.

The petition prayed that the assignees might be ordered to pay to them the proceeds of the sale, upon their undertaking to give up the bills of exchange. The statements in the petition were verified by the affidavit of the petitioners deposing in general terms that the facts there stated were true.

*Aspland*, for the petitioner, relied upon *Edwards v. Brewer* (a), *James v. Griffin* (b), *Crasohay v. Eades* (c); and upon the fact that it did not appear that the consignees surrendered that right to the cargo when they gave it up to the assignees.

*Linklater*, (Solicitor) for the assignees, argued that the bills returned accepted to the petitioners were equivalent to payment for the shipments, and that they might be proved for under the bankruptcy, and, therefore, there was no right of stoppage in the vendors. But assuming that there was a stoppage, there was a subsequent release by the consent of the

(a) 2 M. &amp; W. 375.

(b) Ibid. 623.

(c) 1 B. &amp; C. 181.

vendors, who had a full knowledge of the facts, and the goods became absolutely vested in the assignees. But it does not appear in evidence that any stoppage ever actually took place, and no question has ever been raised upon the matter from 1852 to the present time.

Mr. Commissioner *Evans*. Are the petitioners prepared to prove the stoppage?

*Aspland*. That fact is stated in the petition, and is supported by the affidavit of the petitioners.

MR. COMMISSIONER EVANS. That is not sufficient. Specific evidence ought to be adduced by the petitioners to prove how and when the stoppage took place. Without that I do not think they have any *locus standi* here. Would a mere general allegation sustain trover against assignees in possession? The petition must be dismissed.

Solicitors: *Linklater*; and *Dodd, Grueber, & Rousell*.

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COURT OF  
BANKRUPTCY.  
—  
EX PARTE  
ANDORSEN,  
IN RE  
MANICO.  
*Judgment.*

## EX PARTE FISHER, IN RE STEWART.

Before MR. COMMISSIONER FONBLANQUE.

THIS case was heard on the petition of William Fisher, stating (as far as is material) that Stewart, the bankrupt, and one Coles, carried on business in partnership under the style of Coles and Company. According to the terms of the deed of partnership, dated the 8th of September 1854, the capital of the firm was to consist of 720*l.*, of which sum the bankrupt was to contribute 500*l.* and Coles 220*l.*, and in case of dissolution, the share in the capital was to be returned to each partner respectively. The profits of the business were to be equally divided and each partner was to pay his separate debts out of his own moneys, and to indemnify his copartner and the stock and capital of the firm against the same.

The partnership was dissolved by parol on the 19th of December 1854, when it was agreed that the bankrupt should carry on the business, and take upon himself the debts and liabilities of the firm, and that he should pay Coles 80*l.* on his retirement from the business.

The dissolution was advertised in the *London Gazette*, and a printed circular was sent by Coles to most of the creditors of

COURT OF  
BANKRUPTCY.  
*April 3.*  
C. and S. carried on business in partnership under the style of C. & Co. C. afterwards retired from the firm with the knowledge of the joint creditors; the dissolution was advertised, and S. continued the business in his own name. He was afterwards adjudicated a bankrupt. Held, that the partnership property was in the order and disposition of the bankrupt, and belonged to

his separate estate. The petition of joint creditors to be at liberty to prove against the partnership property dismissed.

1855.  
 COURT OF  
 BANKRUPTCY.  
 ———  
 EXPARTE  
 FISHER,  
 IN RE  
 STEWART.  
 Statement.

the firm of Coles and Company, viz., "I beg leave to inform you that I have dissolved partnership as one of the firm of Coles and Company, (see *London Gazette*, December 19th 1854) having relinquished and transferred all assets, outstanding debts, and liabilities, into the hands of Mr. G. C. Stewart, [the bankrupt] one of the above-named firm, to whom application is henceforth to be made in all matters connected therewith. Signed, JOHN COLES, late partner in the firm of Coles and Company." Prior to the dissolution the bankrupt informed his partner that he had no private debts. The petitioner supplied goods to the partnership to the amount of 209*l.* 4*s.*, for which he drew bills of exchange, which were accepted by the firm, but which were dishonoured at maturity. Pending the arrangements for dissolution between Coles and the bankrupt, the petitioner and one Mr. Prior, who were then the only creditors of the partnership to any considerable amount, were requested by the bankrupt and Coles to take back a portion of the stock which they had each sold to the firm, which they each consented to do, and the stock was accordingly taken by the petitioner and Mr. Prior, and regularly invoiced to them respectively at the price at which they had been sold to the firm. At this time it appeared that the firm of Coles and Company was perfectly solvent, and that they had assets to the extent of 40*s.* in the pound.

After the dissolution the bankrupt continued to carry on the business down to the month of February 1855, when he called his creditors together, and submitted to them a balance sheet or statement of his affairs, dated the 7th of February of the same year, by which it appeared that he was indebted to his father in the sum of 800*l.* and upwards, which debt was thus entered in his balance sheet, viz., "1854, September. To Andrew Stewart, for cash advanced upon my joining Mr. John Coles, and subsequent loans and liabilities, 596*l.* 12*s.* 6*d.* To ditto, prior to that period, 260*l.* = 856*l.* 12*s.* 6*d.*"

The bankrupt then offered the joint creditors of the firm a composition of six shillings in the pound, which they declined to take, considering that they were entitled to the assets of the firm, which were believed to be sufficient to pay twenty shillings in the pound. But the bankrupt was advised that the assets were divisible amongst his separate creditors. The adjudication in bankruptcy took place on the 19th of February, on the petition of the bankrupt's father.

At the meeting for the choice of assignees, the petitioner tendered a proof for his debt, when the choice was adjourned, and the petitioner was to be at liberty to present a petition,

setting out the facts upon which his claim to proof against the separate estate of the bankrupt arose. The prayer was that it might be ordered that the stock-in-trade and effects of the firm of Coles and Company, as well as the outstanding debts due to the copartnership continued and are the joint assets of that firm, and are liable to pay the joint creditors of the firm in priority to the separate creditors of the bankrupt.

It was proved that the petitioner and Mr. Prior were consulted by Coles and the bankrupt, prior to the dissolution, as to the best mode of carrying on the business, Coles being at that time utterly unable, from bad health, to continue to assist in the affairs of the partnership.

*Norton* (Solicitor) for the petitioner.

The dissolution does no more than declare that the affairs of the partnership should be carried no further than for the purpose of winding up. If it were otherwise, it would be a temptation for partners on a dissolution to divide their debts, and then to procure themselves to be made bankrupt, and so shut out the joint creditors from any participation in the assets of the firm. The shortness of time between the dissolution and the bankruptcy raises the suspicion of a fraudulent intention in the dissolution. He cited *Exparte Williams* (a), and *Exparte Ruffin*. (b)

*Lawrance* (Solicitor) for separate creditors.

Notice of dissolution was given in the *Gazette*, and a private circular was sent to the creditors. After the dissolution the style of the firm was altered, and the business was continued in the name of the bankrupt. Thus the joint assets became in the order and disposition of the bankrupt, and belong now to his separate estate. Such a result was probably not contemplated by the partners. To presume otherwise would be to raise the imputation of fraud, which has not been established by the other side: *Exparte Fell* (c), *Exparte Rowlandson* (d), *Exparte Wheeler* (e), *Exparte Freeman* (g), *Exparte Leaf* (h), *Exparte Clarkson* (i), *Exparte Kennedy*. (k)

MR. COMMISSIONER FONBLANQUE. To take this case out of the rule in *Exparte Ruffin* and subsequent authorities, fraud must be distinctly proved. The evidence has shown that the contemplated dissolution of partnership between Coles and the bankrupt was known, and in some degree assented to, by

(a) 11 Ves. 3.

(b) 6 Ves. 119.

(c) 10 Ves. 347.

(d) 1 Rose, 416.

(e) Buck, 25.

(g) Buck, 471.

(h) 1 Dea. 176.

(i) 4 Dea. & Ch. 56.

(k) 1 De G. M'N. & G. (Bkcty.)

100.

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COURT OF  
BANKRUPTCY.  
EXPORTE  
FISHER,  
IN RE  
STEWART.  
Statement.

Argument

Judgment

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 EXPARTE  
 FISHER,  
 IN RE  
 STEWART.  
 Judgment.

the separate creditors; it is, therefore, impossible to believe that any fraud was intended. I am compelled to decide, in conformity with the established authorities, the partnership property was in the order and disposition of the bankrupt at the time of his bankruptcy, and belongs to his separate estate.

The petition was dismissed, without costs.

Solicitors: *Lawrance & Plews*; and *Norton*.

## IN RE ———.

COURT OF  
 BANKRUPTCY.  
 Proof on a bill  
 of exchange  
 accepted by  
 bankrupt's  
 wife rejected.

IN this case a proof was tendered on a bill of exchange accepted by the bankrupt's wife.

There was no argument.

MR. COMMISSIONER FONBLANQUE was of opinion that the wife's power to bind her husband, as his agent, for debts incurred in the purchase of articles of necessity, did not extend so far as to entitle her to pledge his credit on a negotiable instrument.

Proof rejected.

COURT FOR  
 RELIEF  
 OF INSOLVENT  
 DEBTORS.

JAN. 27.

Where an insolvent has been discharged under 1 & 2 Vict. c. 110., and is subsequently committed on a judgment for the non-payment of a debt which is set out in the schedule, this Court has no power to grant a discharge.

Judgment.

## RE ALFRED JOSEPH CHRISTY.

Before MR. COMMISSIONER MURPHY.

*HUGHES* applied for a discharge to issue under the following circumstances. The insolvent had petitioned the Court under the 1 & 2 Vict. c. 110., and had been discharged; subsequently he had appeared at a County Court in answer to a judgment summons, which had been issued at the suit of a creditor whose debt was duly inserted in the schedule. The Judge, notwithstanding the discharge, had ordered him to be committed, and he was now in prison.

MR. COMMISSIONER MURPHY said he regretted he had no power to interfere. The Protection Statutes authorized this Court under similar circumstances to grant relief; but section 90. of 1 & 2 Vict. c. 110. referred insolvents who should be arrested after their discharge on account of debts which were inserted in their schedules, to the Court out of which the process issued. The process here had issued from the County Court, and the application must be refused.

Attorney: *Wells*.



## RE GEORGE HARROD.

Before MR. COMMISSIONER PHILLIPS.

IN 1846 the insolvent had been discharged under 1 & 2 Vict. c. 110., and the debts then owing amounted to 571*l.* 13*s.* 10*d.* He had since contracted fresh debts to the amount of 82*l.* 0*s.* 7*d.*, and he now petitioned for relief under the Protection Statutes as a trader owing less than 300*l.*

MR. COMMISSIONER PHILLIPS said, where an insolvent had been discharged under the 1 & 2 Vict. c. 110., and subsequently petitioned the Court under the Protection Statutes, as a trader owing less than 300*l.*, his practice had hitherto been to take into consideration, under the second insolvency, the debts owing under the first, and if together they exceeded 300*l.*, to dismiss the petition; but as his Brother Commissioners had decided otherwise (a), and as it was desirable that an uniformity of practice should prevail, he should defer to their opinions, and for the future he should not take such debts into consideration.

Petition sustained.

Attorney: *Vaughan*.(a) *Re Archer*, 2 Bank. & Insolv. Rep. 20.; *Re Hance*, 11 L. T. 373—435.

## RE JOHN MESSENDEN.

Before MR. COMMISSIONER MURPHY.

ON the 6th of February the insolvent had been heard on his first examination, and a day was named for his final order. On the 7th he appeared at the Clerkenwell County Court to answer a judgment summons which had been issued against him at the suit of a creditor whose debt was inserted in the schedule. He had produced his protecting order to the Judge, who, notwithstanding, ordered him to be committed to Whitecross Street Prison for a period of fourteen days, and he was now in custody under that order.

These facts being verified by an affidavit,

MR. COMMISSIONER MURPHY said he should grant a warrant for his discharge forthwith.

Attorney: *Daniel*.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 8.

Where an insolvent has been discharged under the 1 & 2 Vict. c. 110., and subsequently petitions under the Protection Statutes as a trader owing less than 300*l.*, in estimating the amount of his debts, those owing under the first insolvency will not be taken into consideration.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 9.

Where an insolvent is committed to prison by the order of a County Court upon a judgment summons, between the dates of his interim order and final order, for the non-payment of a debt which is inserted in the schedule, and in respect to which he is protected from process, this Court will grant a discharge.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 20.

Where an insolvent is opposed on the ground of a breach of promise of marriage, this Court will not rehear the case, but will estimate the length of the remand by considering the situation in life of the parties to the action, and the amount of damages recovered.

## RE WILLIAM MOLE.

Before MR. COMMISSIONER MURPHY.

IN October 1853 the opposing creditor, by her next friend, had sued the insolvent for a breach of promise of marriage, and judgment was obtained by default. In November of the same year the damages were assessed at 25*l*. The costs were subsequently taxed at 32*l*.; and in December 1854, the insolvent was taken in execution upon the judgment. He now petitioned for a discharge under 1 & 2 Vict. c. 110., describing himself as an assistant to a bookseller. There was no debt in the schedule but that of the detaining creditor, who, it appeared, was a domestic servant.

*Reed* proposed to call evidence of the facts relating to the breach of the promise of marriage.

*Dowse*, for the insolvent, objected, and contended the case had been already heard and determined, and the only question remaining was the remand to be pronounced.

*Judgment.*

MR. COMMISSIONER MURPHY said he had but one duty to perform. All the facts of the case had been brought before a competent tribunal, and 25*l*. had been awarded as the measure of damages sustained by the plaintiff. This Court would not rehear the facts, but, in estimating the length of the remand, would look to the situation in life of the parties to the action, and the amount of damages recovered. A long period had elapsed between the cause being heard and the arrest of the insolvent. He thought justice would be done by remanding the insolvent for three calendar months from the date of the vesting order.

Remanded accordingly.

Attorneys: *Philp*; and *M. Lewis*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 21.

Where an insolvent fails to describe himself of all the places where he has resided during the six months next immediately preceding the date of his petition, the petition will be dismissed.

## RE WILLIAM BENNETT.

Before MR. COMMISSIONER MURPHY.

THE insolvent, who described himself as a pearl stud and button maker, came up on his first examination, supported by *Nicholls*.

It appeared that shortly before the date of his petition he had removed two lathes to some premises in Britannia Street,

where he had resided for three weeks. The lathes were not mentioned in the schedule, and he had not described himself as of Britannia Street.

*Sargood*, for the opposing creditor, said, setting aside the question of property which had been removed, and not accounted for, it was clear the petition could not stand, the description being insufficient.

MR. COMMISSIONER MURPHY. I am afraid there is no help for it. Britannia Street is wholly omitted in the description, and the petition must be dismissed.

Attorney: *Wells*.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
RE WILLIAM  
BENNETT.

*Judgment.*

## RE ROBERT HALL.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, who described himself as a publican, came up on his adjourned interim order.

It appeared that within three months of the date of his petition, he had assigned the whole of his furniture and fixtures to his brewers by a bill of sale to secure a past debt. The date of this transaction was incorrectly stated in the schedule, it being there alleged to have occurred so far back as June 1854.

A creditor opposed in person, and complained of the assignment, and called for the production of the bill of sale, which, upon being produced, disclosed the inaccuracy of the date in the schedule.

MR. COMMISSIONER PHILLIPS said the incorrect date given to the assignment in the schedule was a suspicious circumstance; however, the bill of sale put the insolvent out of Court. The allegation in the petition that he had not parted with or charged any of his property within three months of the date of filing the petition, was untrue. The case was not within the exceptions allowed by the law, and the petition must be dismissed.

Attorney: *Marshall*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
Feb. 22.

Where a petitioner for protection parts with or charges property, except for the necessary support of himself and family, and the necessary expenses of his petition, or in the ordinary course of trade, within three months of the date of filing his petition, the petition will be dismissed.

*Judgment.*

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 22.

E., a petitioner for protection, having placed a phaeton in the possession of a sister shortly before the filing of his petition, accounted for the fact by stating he had sold the same to her husband two years since. The Court, believing such statement to be a stratagem to defraud the creditors of their just rights, dismissed the petition.

*Statement.*

## RE JOHN EDWARDS.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, who described himself as a general shopkeeper and cab proprietor, came up on his adjourned interim order. It was elicited in examination that between two and three months before the filing of his petition he had placed in the possession of a Mrs. Hill, a sister, a phaeton which he swore he had sold to her late husband about two years since for 15*l*. He admitted he had had the constant use of it from the time of the sale up to the period of its being sent to Mrs. Hill, and alleged as the reason the death of his brother-in-law shortly after the purchase, and that he had never since been required to deliver it up. He had never communicated to his sister the purchase her husband had made, and she, on cross-examination, admitted that she had never heard of the transaction until the insolvent brought the phaeton to her house. She had heard the insolvent was in difficulties, and to assist him had repurchased his horse and cab from the auctioneer to the Court, which she now permitted him to use. It was sworn to by the insolvent, and corroborated by his wife, that the grocery business had been carried on by his son since June 1854, but the son, on examination, denied the fact, and stated he had never participated in the profits, and that his mother, who managed the business, had never accounted to him for the money it produced. It appeared that in June 1854 the opposing creditor, a corn dealer, had insisted on the payment of his account, when the insolvent had stated "He had no money, and that he should do as other people had done before him, and go through the Court."

He subsequently, however, gave a Judge's order, under which the debt was to be paid on the 30th of November. On the 1st of December he filed his petition under the Protection Statutes.

*Argument.*

*Sargood*, for the opposing creditor, commented on the above facts, and contended the insolvency was concerted and fraudulent, and that the petition should be dismissed.

*Nicholls*, for the insolvent, urged there was no evidence of collusion; and if the transaction respecting the phaeton had not been a *bond fide* one, there was no reason to induce the insolvent to deliver it up when he did, inasmuch as at that time there was no impending execution, and he had no distress for rent to fear. With regard to the grocery shop, the creditors had sustained no injury, for if it was of any value, it was as free to them now as ever.

MR. COMMISSIONER PHILLIPS said the case was an experiment on the indulgence of the law and the credulity of the Court. It was impossible to consider the evidence and not come to the conclusion that the insolvency was concocted. Mrs. Edwards swore to that which, if the son was to be believed, was utterly false; she swore she managed the grocery business, and accounted to him for the proceeds; he swore he never had anything to do with it, and never participated in the profits. It was a frightful picture to see a husband calling a wife to prove that which he well knew never existed. The learned counsel for the insolvent had seen where the shoe pinched, and apparently attached but little importance to the conversation which occurred between the opposing creditor and the insolvent in June 1854. It was clear the insolvent then contemplated a petition for relief, for he said "He should do as other people had done before him, and go through the Court." According to the swearing, the giving up of the phaeton must have occurred in October; and the insolvent had sworn that he then had no intention of coming to this Court; but it was plain, from the conversation before referred to, that he did contemplate the present application so far back as June 1854. And it was equally clear that before the 30th of November had arrived, when the payment under the Judge's order would be due, the phaeton had gone out of the insolvent's possession, and was in the coach-house of Mrs. Hill. On the first of the next month his petition was filed. Who could doubt that the story was concocted? The phaeton was bought for 24*l.* or 28*l.* sold for 15*l.*, and that, according to dates, about the very time of the purchaser's death. It was kept for two years after it had become the property of another person, and then given up to a sister who did not know she had any interest in it. He believed the whole statement was a stratagem to defraud the creditors of their just rights. The Act was made for the unfortunate, who had fallen into difficulties through misfortune, and not for those who dishonestly endeavoured to defraud their creditors.

Petition dismissed.

Attorney: *M<sup>c</sup>Duff*.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
—  
RE JOHN  
EDWARDS.  
*Judgment.*

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 23.

The insolvent described himself as a manager to an insurance company. He had been engaged in that capacity by two insurance companies, but he had not described himself specifically of either. *Held*, the description was insufficient, and petition dismissed.

Argument.

## RE CHARLES WILLIAM BEVAN.

Before MR. COMMISSIONER MURPHY.

THE insolvent, a petitioner under the Protection Statutes, had described himself as a manager of an insurance company. It appeared he was acting in that capacity to the Universal Provident Life Assurance Company, at a salary of 500*l.* a year. He had been previously engaged for a period of between two and three years as manager and secretary of the Deposit General Life Insurance Company, at a salary of 400*l.* a year. He had not described himself specifically in either situation.

*Robinson*, with whom was *Macrae*, for the opposing creditor, contended the description was insufficient. The Act of Parliament required a full description of all the businesses which an insolvent had carried on during his six months' residence within the jurisdiction of the Court. The present description would give no information to those who had claims against the insolvent in his capacity of manager to the Universal Provident Life Assurance Company, and the importance of a full description could not be overrated, when the number of established insurance companies was considered. Suppose an insolvent described himself as a manager to a charity, or as a Government clerk, without specifying the name of the charity, or the particular branch of the Government where his services were employed, such a description would be clearly insufficient, as it would convey no definite identity of the petitioner to the world, and the insolvent's description was defective for the same reasons.

*Sargood*, for the insolvent, contended the description was sufficient. It had never been the practice for a clerk to a commercial house to set out in his description the name or names of the firm in whose employment he had been engaged, and such a practice would be extremely objectionable, inasmuch as it would involve the continual publication of highly respectable names in connection with an insolvency.

Judgment.

MR. COMMISSIONER MURPHY said he did not consider that description sufficient, and dismissed the petition.

Attorneys: *F. Hobler ; Collins.*

## RE JOSEPH KENT.

Before MR. COMMISSIONER PHILLIPS.

**REED** moved, upon the nomination of creditors, for the appointment of Mrs. Mary Ann Bodien as assignee to the estate of this insolvent. The object of the appointment, as stated in her affidavit, was to present a petition to the High Court of Chancery to prevent the transfer of certain funds standing in the name of the Accountant-General of the said Court, and upon which the said insolvent claimed a lien.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 24.

The Court will not, unless under very special circumstances, appoint a female to the office of creditors' assignee.

MR. COMMISSIONER PHILLIPS said cases might occur in which, under very special circumstances, the Court would appoint a female creditor to the office of an assignee; but as the present Act of Parliament permitted the appointment of any proper person to that office, it was not even necessary that the assignee should be a creditor. He presumed there would be no difficulty in nominating a more suitable person, and he should refuse the present application.

Judgment.

Attorney: *Morris*.

## RE WILLIAM EDWARD SCHOTTLANDER.

Before MR. COMMISSIONER PHILLIPS.

**I**N January 1845 the insolvent had been declared a bankrupt, and in the month of May following he had passed his last examination, but he had never applied for a certificate; since that period he had contracted fresh debts, and had been arrested in consequence. He now appeared under 1 & 2 Vict. c. 110.

MR. COMMISSIONER PHILLIPS referred to *Re M. C. Johnstone* (a), and said before he proceeded with the case he should require a certificate from the proper officer of the Court of Bankruptcy certifying what had been done in that Court on the insolvent's last appearance there.

Adjourned accordingly.

(a) 1 County Court Chronicle, 236.

been done there on the insolvent's last appearance.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
Feb. 26.

Where an insolvent is an uncertificated bankrupt, and applies to this Court for a discharge from debts subsequently contracted, this Court, before proceeding with the case, will require a certificate from the proper officer of that Court, certifying what had

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

March 1.

Where an insolvent disposes of his property within three months of the date of his petition, except for the necessary support of himself and his family, and the necessary expenses of his petition, or in the ordinary course of his trade, the petition will be dismissed.

Argument.

Judgment.

AN action had been brought against the insolvent by the opposing creditor to recover a sum of 23*l.*, and, on the 13th of November 1854, notice of trial had been given. On the 25th of the same month the insolvent had assigned the whole of his horses and cabs, valued at 180*l.*, to a creditor to secure his debt and to satisfy the claims of two other creditors named in the assignment. On the 12th of December the action was tried, and a verdict found for the plaintiff for the amount claimed, and, on the 4th of January 1855, the costs were taxed at 34*l.* On the 3rd of January the insolvent filed his petition under the Protection Statutes, and he now came up to be heard on his first examination.

*Nicholls*, for the opposing creditor, submitted the petition must be dismissed. The insolvent had disposed of the whole of his property within three months of the date of his application for relief. The petition, therefore, was untrue, and the Court would not sustain it.

MR. COMMISSIONER PHILLIPS said it was quite clear the disposition of property by the insolvent was not within the exception allowed by the law, and moreover it had occurred at a period which gave to the transaction a suspicious aspect. A point had been made by the learned counsel for the opposing creditor to which there was no answer, and upon that point the petition would be dismissed.

Attorneys: *H. Nethersole*; and *J. Ablett*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

March 3.

T., who had filed a petition under the Protection Statutes, applied for its dismissal, and supported the application by producing a consent in writing, signed by each of his creditors.—*Held*, that there must be a release, and the application refused.

## RE WILLIAM ALBERT TARLTON.

Before MR. COMMISSIONER PHILLIPS.

ON the 21st of November 1854 the insolvent had filed a petition under the Protection Statutes. There were seven creditors inserted in the schedule, whose debts amounted to 175*l.* 6*s.* 2*d.* The creditor for the largest sum, 103*l.* 19*s.* 6*d.*, was the insolvent's grandmother, who it appeared had died since the filing of the petition, leaving to the insolvent her property of every description.

*Silvester* (Attorney) applied for the dismissal of the petition,

that there must be a release, and the application refused.



and supported the application by producing a consent in writing, signed by each of the six surviving creditors. A similar application had been made and granted in *Re W. J. Hicks and J. Hicks*, who had filed their petitions as partners, in August 1849, and on the 3rd of December in the same year those petitions were dismissed on a consent being filed signed by each of the creditors excepting one, the largest, who was amply secured by a mortgage on some leasehold property.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
—  
RE WILLIAM  
ALBERT  
TARLTON.

MR. COMMISSIONER PHILLIPS said, as no release had been executed by the creditors, he doubted whether their consent would justify him in dismissing the petition, and he should consult his brother Commissioner on the subject, and mention the matter again.

*Judgment.*

MR. COMMISSIONER PHILLIPS said he had consulted with Mr. Commissioner *Murphy*, and he quite agreed with him that the application should be refused. If the creditors desired the title of the assignee to be destroyed, they must execute a release to the insolvent for the amount of their respective debts.

*March 3.*

Application refused.

Attorney: *Silvester.*

## RE ROBERT COMBES.

Before MR. COMMISSIONER MURPHY.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

*March 7.*

THE insolvent, who described himself as a town traveller and linendraper, came up on his final order.

Between the months of July and September 1854 he had purchased of the opposing creditor goods to the amount of 136*l.* 6*s.* 7*d.* He had paid 24*l.* 11*s.* 6*d.* on account of the same, and given three bills for the balance. The bills were all dated the 17th of October, and became due at two, three, and four months respectively. On the 8th of December he filed his petition under the Protection Statutes, but the schedule disclosed no property for creditors. The special balance sheet contained a minute account of the insolvent's dealings from the month of February 1854, and alleged the receipt, on the 3rd of April in that year, of a sum of 25*l.* as a loan from one W. Powell, an artist. The insolvent credited himself with the payment of this amount by instalments between the months of August and October following. Upon examination, he swore he became acquainted with Powell whilst living at Bethnal Green, and that the 25*l.* was lent in one sum, but he was un-

C., a petitioner for protection, having made false entries in his special balance sheet respecting the receipt and payment of a sum of money, the petition was dismissed.

*Statement.*

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE ROBERT  
COMBES.

*Statement.*

able to give a description of the money. A book, however, was produced which had been filled with his papers, in which appeared, in the handwriting of Powell, a number of entries of instalments received by him at different dates, which dates the insolvent swore truly represented the occasions when the instalments were paid, and the entries made by Powell. He admitted that during the period covered by the payment of the instalments he had employed Powell in various little matters, for which he had paid him a sixpence or a shilling at a time. Powell, on being called, swore his acquaintance with the insolvent did not commence until after the latter had left Bethnal Green, and a witness was called who had introduced the parties to each other at a subsequent period, and who corroborated him in that particular. He swore he had never lent the 25*l.* or any other sum; and that his pecuniary condition had been such for some years past, that even if he had been willing to have made the loan, it had not been within his power. He denied the truth of the alleged repayments, and stated that with the exceptions of a sum of 5*l.* which he had been paid by instalments for two portraits, and a few shillings on account of odd jobs, he had never received any money from the insolvent. He admitted, however, his handwriting in the book produced, and said the entries were all made upon one occasion whilst he was at the insolvent's house in a state of partial intoxication. He swore he had spoken to the insolvent a few days afterwards respecting the entries, and told him he had acted wrongly in making them, when the insolvent replied, "He would hear no more of the matter."

*Argument.*

*Reed*, for the opposing creditor, having commented upon these facts, submitted the schedule was wilfully false, and called upon the Court to dismiss the petition.

*Sargood*, for the insolvent, contended the evidence of Powell was not to be credited, and called upon the Court to sustain the petition.

*Judgment.*

MR. COMMISSIONER MURPHY said no motive had been alleged why the witness Powell should state that which was untrue, and as his evidence had been corroborated in one particular, the balance of testimony was against the insolvent. It was of the last importance that the balance sheet of every insolvent should present a true detail of his dealings, and as the Court had come to the conclusion that the 25*l.* had never been lent or repaid, the petition would be dismissed.

Petition dismissed.

Attorneys: *Marshall*; and *Simpson*.

## IN RE C— AND G—.

*A private arrangement. (a)*

Before MESSRS. COMMISSIONERS FONBLANQUE and HOLROYD.

ON the 11th of November 1854, C. & G. stopped payment, which they announced to G. & Co., their bankers, by letter, desiring them not to pay any cheques on their account. At this time C. & G. had a cash balance of 457*l.* 7*s.* 7*d.* in their favour; but the bankers were under discounts for them to the amount of 10,574*l.* 4*s.* 1*d.* on bills of exchange then running. On the 15th of November, a petition was presented by C. & G. to the Court of Bankruptcy, for arrangement under the control of the Court. (b) At this time none of the bills had been dishonoured. On the 23rd of November, C. & G. commenced an action against G. & Co. for their cash balance.

The first meeting of creditors, under the arrangement, took place on the 15th of January, when *Murray* (Solicitor) for G. & Co. tendered a proof for 283*l.* 2*s.* 5*d.*, the amount of bills then dishonoured, after crediting C. & G. with the amount of the cash balance.

*Lawrance* (Solicitor) for C. & G. contended that the right of set-off did not apply to cases of arrangement, as in bankruptcy.

MR. COMMISSIONER FONBLANQUE reserved his judgment, in order to consult with Mr. Commissioner *Holroyd*, and, all parties consenting, ordered that the action should be stayed until the 23rd of March.

On the 23rd of March, the question again came on for argument before Mr. Commissioner *Fonblanque*, assisted by Mr. Commissioner *Holroyd*.

*Murray*, (Solicitor) for G. & Co., contended for the right of set-off; he cited *Alsager v. Currie* (c), and *Bolland v. Bygrave* (d), and referred to the provisions of the statute relating to proofs under arrangements. (e)

*Lawrance*, (Solicitor) *contra*, contended that the matter in dispute was the subject of an action at Law; that the rules in

1855.  
COURT OF  
BANKRUPTCY.

March 23.

The right of set-off exists under the arrangement clauses of the Consolidation Act of 1849, as in bankruptcy.

Statement.

Argument

Argument

(a) The statute having provided means by which private arrangements between debtors and creditors can be carried on under control of the Court, it is considered improper to publish the names of parties to such arrangements.

(b) 12 & 13 Vict. c. 106. s. 211. *et seq.*

(c) 12 M. & W. 751.

(d) R. & M. 271.

(e) 12 & 13 Vict. c. 106. ss. 215. 216. 221.

1855.  
COURT OF  
BANKRUPTCY.

IN RE  
C— AND G—  
Judgment.

bankruptcy were not applicable to arrangement under the Act, and that the Court had no power to stop the action.

MESSRS. COMMISSIONERS FONBLANQUE and HOLROYD concurred in opinion that the right of set-off obtained, as in bankruptcy, and ordered that the action should be discontinued.

Solicitors: *Lawrance & Plews*; and *Murray & Rymer*.

## EX PARTE BENTALL, IN RE MAY.

Before MR. COMMISSIONER FONBLANQUE.

COURT OF  
BANKRUPTCY.

April 24.

A warrant of attorney to secure an antecedent debt, given *bond fide* within two months of the bankruptcy, and at a time when the bankrupt was unable to meet his engagements, and executed by levy and sale previous to the bankruptcy, is void, notwithstanding sect. 133. of 12 & 13 Vict. c. 106.

Statement.

THE facts in this case, appearing on the petition of Mr. Bentall, and the evidence adduced at the hearing, were as follows:—

The petitioner lent the bankrupt 300*l.* in various sums, viz., 10*l.* in August 1852, 90*l.* in February 1854, and 200*l.* in October 1854. On the 27th of November 1854 the bankrupt executed a warrant of attorney to the petitioner to confess judgment and sue out execution for 300*l.* and interest and costs. The warrant of attorney was duly filed in the Court of Queen's Bench within twenty-one days of its being executed. The petitioner's debt remaining unpaid, judgment was signed against the bankrupt on the 10th of January 1855, upon which a writ of *fi. fa.* issued, addressed to the Sheriff of Suffolk, to levy 306*l.* 8*s.*, and lodged with the sheriff on the same day. On the 13th of January, the goods and chattels of the bankrupt in his dwelling-house and place of business were levied upon and sold by the sheriff's officer, and realised (after paying the costs of the sale) 330*l.* 3*s.* 6*d.*

The adjudication took place on the 13th of January, at a quarter to three o'clock in the afternoon.

The petitioner had no notice of any act of bankruptcy at the time of the sale.

The advances by the petitioner were made to the bankrupt on the faith of representations of the bankrupt that he was in solvent circumstances, but in want of advances for temporary purposes.

An affidavit was filed by the bankrupt, on which he was examined, whence it appeared that in February 1854 he took an account of his affairs, and found himself in a deficiency of about 50*l.*; to arrive at that result he took stock-in-trade at cost price at 750*l.*, fixtures at 90*l.*, and furniture at 60*l.*, the prices

which they had cost him; and that he made a loss by his trading in 1854 by reason of his expenses exceeding his profits, and that such loss subsequently increased. That feeling himself in difficulties from the want of capital, he was obliged, on many occasions during the same year, to ask Mr. Gower, his principal creditor, to renew acceptances which he was unable to meet; and that at the present time he is indebted to the holders of bills of exchange to the several amounts of 66*l.* 12*s.* 3*d.*, 117*l.* 14*s.*, and 49*l.* 17*s.*, which were renewals of former acceptances on Gower's drafts which he was unable to meet on maturity, viz., in the months of September, October, and December 1854. No bills announcing the sale were posted till the evening of the 12th of January, between eight and nine o'clock. On the 13th of January, at about eight o'clock, the bankrupt gave directions to his shopman to deny him to his creditors; and during the sale the auctioneer's clerks collected the money, which on this occasion was paid for by the purchasers of the lots as the hammer fell, and paid the same over to the sheriff's officer, and in this manner 210*l.* was paid to the officer before three o'clock, the hour on which the petition for adjudication was filed. The proceeds of the sale were in the hands of the auctioneer, and were claimed by the assignees. The petitioner submitted to the jurisdiction of the Court, and prayed that he might be declared to be entitled to his debt and costs out of the proceeds of the sale of the bankrupt's effects now in the hands of the sheriff.

*Bagley*, for the petitioner, read several letters from the bankrupt to the petitioner, representing the solvency of the former. He contended that the mode in which the later advances were made, showed a *bonâ fide* belief in the mind of the petitioner in the truth of the bankrupt's statements as to the state of his affairs. There has never been any imputation of a fraudulent intention on the part of the bankrupt, who has obtained his certificate, nor had the petitioner any notice of any act of bankruptcy when the power of attorney was executed.

The transaction is within the protection of section 133. of the statute. (a) The petitioner is entitled to the proceeds of the sale, or at any rate to so much as was received before the hour at which the petition for adjudication was filed. (b)

*Aspland*, for the assignees. The warrant of attorney is void

(a) 12 & 13 Vict. c. 106. s. 133., (*inter alia*) — All executions and attachments against the goods and chattels of any bankrupt, *bonâ fide* executed and levied by seizure and sale before the date of the fiat or the filing of such petition (for adjudication) shall be deemed to be valid.

(b) It is the practice for the chief registrar to make a minute of the exact time of the day at which petitions for adjudication are filed, and in this case the chief registrar's minute was considered to determine the fact.

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Statement.

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EX PARTE  
BENTALL,  
IN RE MAY.

*Argument.*

in itself (a); it was given for an antecedent debt, and at a time when it is clear that the bankrupt was unable to meet his engagements as evidenced by the fact that he was compelled to renew his acceptances to Gower, and that he was making increasing losses. The warrant of attorney cannot be made to relate back to any previous agreement between the parties.

The assignees are entitled to the proceeds of the sale, the same not having been concluded at the time of the bankruptcy.

*Bagley*, in reply, did not resist the claim to the proceeds received after three o'clock; as to the rest he contended that there was a complete sale by the payment of the purchase moneys to the sheriff's officer before that time. Sections 135. and 184. ought not to be construed to override the 133rd. Reading them all together, it may be fairly held that sections 135. and 184. apply to warrants of attorney, &c., *not executed* at the time of the bankruptcy.

It is not to be assumed that a trader is unable to meet his engagements, because he requires advances or renewals; these may be for the purpose of extending or improving his business. It does not appear that the bankrupt was, at the time of executing the warrant, unable to meet his engagements then due. If the statute were to apply to all accruing liabilities, no trader could be held to be solvent.

It has not been shown that the bankrupt over-estimated the value of his property, or that the statements made in his letters to the petitioner were untrue. The *bona fides* of the transaction with the petitioner has not been impugned.

*Judgment.*

MR. COMMISSIONER FONBLANQUE. I will not give any opinion upon the question raised at the bar as to the time between the sale and the bankruptcy, because I think that there is enough on the construction of the statute to enable me to decide upon this case. The warrant of attorney was given for an antecedent debt within two months of the filing of the petition for adjudication at a time when the bankrupt was unable to

(a) 12 & 13 Vict. c. 106. s. 135. Every warrant of attorney, &c., given by any bankrupt after the commencement of this Act within two months of the filing of a petition for adjudication, &c., and being for or in respect of (wholly or in part) an antecedent debt or money demand, and every cognovit or consent to a Judges order for judgment given by any bankrupt at any time after the commencement of this Act, and within two months of the filing of any such petition in any action commenced by collusion with the bankrupt, and

not adversely, or purporting to have been given in an action, but having been in fact given before the commencement of any action against the bankrupt, such bankrupt being unable to meet his engagement at the time of giving such warrant of attorney, *cognovit actionem*, or consent (as the case may be), shall be deemed and taken to be null and void, whether the same shall have been given by such bankrupt in contemplation of bankruptcy or not. See also s. 184.

meet his engagements. I do not wish to measure the solvency of a trader by too fine a test, but here taking the view most favourable to the bankrupt's state of affairs, at the time when the warrant of attorney was executed, I cannot come to the conclusion that he was solvent. The stock was not of such a nature as to realise its cost price if sold to meet a sudden emergency, and heavy liabilities were coming due, and it has been admitted that there was an increasing deficiency in the bankrupt's business.

The petition was dismissed, both parties paying their own costs.

Solicitors: *Reed, Langford, & Marsden*; and *Aldridge & Bromley*.

### RE BRIDGES.

Before MR. COMMISSIONER FONBLANQUE.

ON the 14th of April the bankrupt made an assignment of all his estate and effects for the benefit of his creditors. On the 16th Harrod and Turner, creditors of the bankrupt, filed a petition for adjudication against him, but did not proceed upon it. On the 27th, May Prentice and Thomas Prentice, also creditors of the bankrupt, being desirous that the adjudication should be proceeded with, caused an affidavit of their debt to a sufficient amount, and of the fact of the bankrupt being a trader within the meaning of the bankrupt laws, to be filed (a); but they did not attend the Court on that day, having obtained an order of the Court dispensing with their personal attendance. (b) On the application of Mr. Trinder, the solicitor for the Prentices, the Court was pleased to order that a summons might issue to compel the attendance of a witness who was to produce the deed of assignment of the 14th of April as proof of an act of bankruptcy.

On the 28th, Harrod and Turner caused an affidavit of their debt to be filed. They did not attend the Court, and omitted to obtain an order dispensing with their attendance, and by their solicitors, Messrs. Chilton, Burton, and Co., caused witnesses to be examined to prove a trading and act of bankruptcy.

On the 30th Mr. Trinder, solicitor for the Prentices, obtained

(a) 12 & 13 Vict. c. 106. ss. 97—108. (b) Rules and Orders, No. 12.

*Quere*, can a petitioning creditor proceed with the adjudication after three days, not having obtained an extension of time.

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COURT OF  
BANKRUPTCY.

EX PARTE  
BENTALL,  
IN RE MAY.  
Judgment.

COURT OF  
BANKRUPTCY.  
May 2.

A petitioning creditor did not proceed with the adjudication within three days. Another creditor sought to proceed with the adjudication, and proved his debt, &c., but did not attend the Court, having obtained an order, under rule 12., dispensing with his personal attendance. The original petitioner subsequently filed an affidavit of debt, but did not attend the Court, or obtain an order under rule 12. His affidavit was ordered to be taken off the file.

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Statement.

an order to show cause why the affidavit of debt by Harrod and Turner should not be taken off the file, on the ground of irregularity; they not having attended the Court or obtained an order dispensing with their personal attendance.

The question was also raised, whether a petitioning creditor who had failed to prosecute his petition within the three days, and not having obtained an extension of time for that purpose, could sustain the right to proceed with his petition against a creditor who had proved a sufficient debt, and who had applied to the Court to proceed with the adjudication. (a)

Judgment.

MR. COMMISSIONER FONBLANQUE was of opinion that the nonattendance of Harrod and Turner was a sufficient irregularity to deprive them of the right to proceed with the adjudication in preference to the Prentices, who had complied with the rules. He gave no opinion on the question of time.

Solicitors: *Trinder & Eyre*; and *Chilton, Burton, & Co.*

(a) 12 & 13 Vict. c. 106. s. 103.

COURT OF  
BANKRUPTCY.

May 11.

Service of  
notice of  
motion  
on the soli-  
citor of the  
party to be  
affected by  
the motion,  
where such  
person will  
not be per-  
sonally  
affected by  
the order  
sought for,  
is sufficient.

Statement.

## EX PARTE DIGAN, IN RE READE AND READE.

Before MR. COMMISSIONER FONBLANQUE.

BEFORE the bankruptcy of Reade and Reade, Mr. Digan had been in the habit of shipping merchandize from Ireland, to be sold by the bankrupt firm, upon commission, and, as customary amongst merchants, was in the habit of drawing bills of exchange against the shipments, which bills were accepted by the bankrupts. When the bankrupts stopped payment in April 1854, they had in their hands 869*l.* 18*s.* 5*d.* cash, to the credit of Mr. Digan, on the balance of accounts; and as factors of Mr. Digan, they held goods and bills of lading belonging to him to the value of about 1300*l.*, for which they have never accounted.

Previous to April 1854 Mr. Digan had drawn on, and the bankrupts' firm had accepted, three bills of exchange, viz., one for 1000*l.* due the 30th of April 1854, one for 1100*l.* due the 12th of May, and the third for 650*l.* due the 24th of May 1854, respectively. The bills were indorsed before maturity by Mr. Digan to the National Bank of Ireland, for an advance to their aggregate amount, less the usual discount. The bills were dishonoured by the bankrupts previously to the 12th of July last. The bank, by their proper officer, proved under this bankruptcy for the amount of two of the bills which were then in their hands, but



no dividend had been received in respect of such proof. (a) Mr. Digan paid to the bank the amount due on the bills, and the three bills were handed over to his solicitor. The officer of the bank had consented that his proof should be reduced by expunging so much thereof as relates to the sums proved for; and Mr. Digan directed his solicitor to deliver up the three bills to the assignees.

On the 9th of this month this matter came on, on motion, that the proof should be reduced and the bills given up as above. The notice of motion was duly served on the solicitor for the assignees.

*Linklater*, for the assignees, objected that service on him as their solicitor was not sufficient, and that they ought to be personally served; he referred to rule 17. (b)

*Bagley*, in support of the motion, contended that service on the solicitor on the record was sufficient. He relied on rules 35. 36. 37. 38. (c)

(a) No dividend has been declared.

(b) That (unless the Court shall in any particular case otherwise direct) all applications to the Court in the exercise of its primary jurisdiction by virtue of the Bankrupt Law Consolidation Act, 1849, shall be by way of motion supported by affidavit, upon hearing which the Court shall make such order therein as shall be just; but in cases in which any other party or parties than the applicant are to be affected by such order, no such order shall be made unless upon the consent of such person or persons duly shown to the Court, or upon proof that notice of the intended motion and a copy of the affidavit in support thereof has been served upon the party or parties four clear days at least before the day named in such notice as the day when the motion is to be made, &c.

(c) That a roll or book shall be kept by the chief registrar, in which shall be enrolled the names of all attorneys and solicitors entitled to practise in the Court of Bankruptcy.

That the chief registrar shall keep a book in alphabetical order, for the purposes after mentioned, and the same shall be publicly kept in the Court of Bankruptcy in London, to be there inspected by any enrolled attorney or solicitor. And that every attorney or solicitor enrolled in the Court of Bankruptcy, shall at the time of his signing the book or roll, mentioned in rule 35. enter in

such alphabetical book his name and place of abode, or business, where he may be served with notices, summonses, orders, and rules, in matters depending in the Court, and as often as any attorney or solicitor shall change his place of abode or business, he shall make the like entry thereof in the said book; and all notices, summonses, orders, and rules, which do not require personal service, shall be deemed sufficiently served on such attorney or solicitor, if a copy thereof shall be left at the place last entered in such book, with any person resident at or belonging to such place; and if any attorney or solicitor shall neglect to make such entry, then the fixing up of any notice, or the copy of a summons, order, or rule, for such attorney or solicitor, in the office of the chief registrar, shall be deemed as effectual and sufficient as if the same had been served at such place of residence or business as aforesaid.

That the like alphabetical book of names and residences shall be kept by the senior registrar of every District Court in the country having two registrars, and by the registrar of every District Court in the country where there is only one registrar, in which book every attorney and solicitor resident in, and usually practising in such district respectively, shall in the like manner, and subject to the same regulations, enter his name and place of abode and business.

That in case the place of abode or

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Statement.

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EX PARTE  
DIGAN.  
*Judgment.*

MR. COMMISSIONER FONBLANQUE reserved his opinion, in order that he might confer with his colleagues on the practice, as the point had not yet been decided.

This day the Court held that in cases where the party served was to be personally affected by the order, the notice should be served personally, but in other cases service on the solicitor was sufficient. In the present instance the assignees were only stake-holders, and had no personal interest in the order sought for by the motion.

The objection was overruled.

Mr. *Bagley* was then heard in support of the motion, but it appearing that an action at Law was pending on the same subject, the Court was pleased to adjourn the hearing to a distant day after the trial of the action.

Solicitors: *Wm. Tatham*; and *Linklater*.

business of any attorney or solicitor be not within a circuit of five miles from the General Post Office in London, or within five miles of the place appointed for the sittings of any District Court of Bankruptcy in the country districts, such attorney or solicitor shall appoint, and enter in the said alphabetical book, some convenient place within three miles circuit of the General Post Office, if he

be an attorney or solicitor usually practising in the Court of Bankruptcy in London, or within three miles of the place of sitting of the District Court, if usually practising in any country district where such notices, summonses, orders, and rules as aforesaid may be served on him, subject to the regulations aforesaid.

COURT OF  
BANKRUPTCY.

May 15.

The Court of Bankruptcy has jurisdiction to release from custody a bankrupt who has been taken in execution under stat. 12 & 13 Vict. c. 106. s. 257., (a) after he has remained in prison for twelve months.

## RE BARNSHAW.

Before MR. COMMISSIONER EVANS.

THE bankrupt had been taken in execution under a writ issued upon the certificate under seal of the Court granted after refusal of protection under sect. 257.; he had remained in prison for twelve months.

(a) That the assignees for the time being of the estate and effects of any bankrupt when the accounts relating to estate shall have become records of the Court, shall be deemed judgment creditors of such bankrupt for the total amount of the debts which shall by such accounts appear to be due from him to his creditors; and every creditor of any bankrupt immediately after the proof of his debt shall have been admitted, shall be deemed a judgment creditor of such bankrupt to the extent of such proof; and the Court, when it shall have refused to grant the bankrupt any further protection, or shall have refused

or suspended his certificate, shall, on the application of such assignees, or of any such creditor, grant a certificate under the seal of the Court in the form contained in Schedule B a to this Act annexed, and every such certificate shall have the effect of a judgment entered up in one of her Majesty's Superior Courts of Common Law at Westminster, until the allowance of the certificate of conformity of such bankrupt; and the assignees or the creditor to whom, according to such certificate, the bankrupt shall be indebted as therein mentioned, shall be thereupon entitled to issue and enforce a writ of

*Lawrance* (Solicitor) now applied for his release.

*Denney*, for the assignee, who was also the detaining creditor, opposed, on the ground that this Court had no jurisdiction. The writ of *capias* issued from one of the Courts at Westminster, and that Court only had power to order the release.

1855.  
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BANKRUPTCY.  
RE  
BARNSHAW.

MR. COMMISSIONER EVANS, after consulting with Mr. Commissioner *Holroyd* and Mr. Commissioner *Fonblanque*, was of opinion that this Court had jurisdiction, and ordered the bankrupt to be discharged from custody. (a)

Solicitors: *Lawrance*; and *Aldridge & Co.*

execution against the body of such bankrupt; and the production of any such certificate to the proper officer of any such Superior Court shall be sufficient authority to him to issue and seal such writs; and it shall be lawful for such Superior Courts to make such orders and rules in that behalf as to them shall seem fit; provided always that every such last-mentioned certificate shall be deemed to have been cancelled and discharged by the allowance of the certificate of conformity of such bankrupt from the time of such allowance, provided also that no execution by virtue of any certificate which shall be granted

to any creditor or assignees as aforesaid, shall be issued, nor shall any such certificate or execution in any manner affect any estate or effects which shall come to or be acquired by the bankrupt after the allowance of his certificate of conformity.

Sect. 259. That if any bankrupt shall be taken in execution after the refusal of protection, or after refusal or suspension of his certificate, he shall not be discharged from such execution until he shall have been in prison for the full period of one year—except by the order of the Court.

(a) See *Ex parte Bedford*, Fonb. Rep. 213.—ED.

## EX PARTE DAVISON, IN RE BERESFORD.

Before MR. COMMISSIONER FONBLANQUE.

THE petition in this case stated in effect that Reuben Treasure, the petitioning creditor in the bankruptcy, was chosen trade assignee; that the bankrupt had not yet passed his last examination; that Treasure had, through the agency of one Lavey, entered into an agreement with the bankrupt, in consideration of 40*l.* to be paid in cash forthwith, and a further sum amounting to the balance of his debt proved in the bankruptcy to be secured by bills of exchange payable at various periods within two years, to waive all claim against the estate; and that in pursuance of such agreement the bankrupt obtained the 40*l.* from his friends, and gave it to Lavey for Treasure; but before the money had been given to Treasure, he was advised that the proposed arrangement was improper, and he demanded and received back his money from Lavey. The bankrupt, in

COURT OF  
BANKRUPTCY.

May 15.

On a petition to remove an assignee for entering into an agreement with the bankrupt to compromise his debt, it being shown by the respondent that he acted under a *bonâ fide* belief that all the other creditors were to be equally compounded with, the petition was dismissed, with costs.

1855.  
 COURT OF  
 BANKRUPTCY.

EX PARTE  
 DAVISON.

Statement.

his affidavit, confirmed the statement in the petition; the prayer of which was, that Treasure might be removed from the office of assignee, and that a new choice might be appointed.

The respondent's affidavit admitted that a composition was in contemplation, but stated that the respondent was informed and believed that the bankrupt had obtained the consent of all his other creditors to annul the adjudication on the payment of their debts, and that he agreed to the proposed arrangement solely on that belief and on condition that all the other creditors should be also paid.

Treasure's solicitor confirmed the above affidavit, and his clerk deposed that a friend of the bankrupt had informed him that counsel had been instructed on behalf of the bankrupt to draw a petition for annulling the adjudication, and asked him to state in writing what terms Treasure would accept; but he refused to do so.

Argument.

*Fonblanque*, for petitioner, submitted that a sufficient case had been made out for the removal of the assignee.

*Lucas, contra*, contended that Treasure had acted throughout in a *bonâ fide* belief that the adjudication was to be annulled by the consent of all the creditors. The object of the petition was, in fact, to substitute a friend of the bankrupt for an assignee whose vigilance the bankrupt had reason to fear.

*Fonblanque*, in reply, said that it was impossible that the petitioner could have the motives attributed to him by the other side, as Treasure, even if removed from his position as assignee, would, as a creditor, have every opportunity of looking into the bankrupt's affairs, and, if he thought proper, to oppose the passing of the last examination or the granting of the certificate. Treasure, on his own showing, had taken the reports about the *supersedeas* too much for granted. It was his duty as assignee to have obtained the most positive assurance that such a proceeding was actually in the course of being carried into effect before he even contemplated anything for his own benefit. It was only on the advice of his solicitor that the arrangement with the bankrupt was put an end to, and that not until the bankrupt had been induced to obtain money and pay the same to Lavey. A person who could even entertain such an arrangement was not fit to be trusted with the interests of creditors.

Judgment.

MR. COMMISSIONER FONBLANQUE. This is an application to remove an assignee, not for anything that he has done, but for something that might have been done. The whole case rests on the affidavits, and looking at them, I have no hesitation in relying most on those of the respondent. It certainly would

have been better if the assignee had taken more pains to ascertain the truth of the statements as to the intended superseding ; but no case has been made out to show that he intended a corrupt compromise. The petition must be dismissed, with costs.

Solicitors: *Thomas Stubbs* ; and *Henry Levy*.

1855.  
EX PARTE  
DAVISON.  
Judgment.

### ANONYMOUS.

Before MR. COMMISSIONER FONBLANQUE.

COURT OF  
BANKRUPTCY.  
May 16.

THIS was a trader debtor summons (a) issued against A. B. and Co. The affidavit of debt was, as far as material, as follows ; viz., that A. B. and Co. are justly and truly indebted to this deponent in the sum of 1130*l.* 4*s.* 9*d.* for the value of timber deposited with the said A. B. and Co. at their request by this deponent, for sawing, between the months of January and April 1854.

On a trader debtor summons, the affidavit of debt stated that the claim was for the value of goods deposited with the defendant for the purpose of being worked upon. Affidavit held to be insufficient, and summons dismissed, with costs.  
Argument.

*Bagley*, for A. B. and Co., objected to the affidavit. He relied on the Rules of Court (b), and on *Woolley v. Thomas*. (c) The affidavit showing no cause of action in the nature of debt, but merely alleging that the timber was deposited, not even that it was wrongfully detained, the debtor could not be required to answer whether he owed the debt or not. There may be many good reasons why the timber has not yet been returned. Would an order to hold to bail issue at Westminster in such a case ?

*Holman*, (Solicitor) *contra*. In fact, the timber has been destroyed by fire, while in the custody of A. B. and Co., and therefore, an action for debt might be sustained.

MR. COMMISSIONER FONBLANQUE said he could only look to the affidavit. The objection seemed to him to be sufficient, though he could have wished to have heard an argument in answer.

Judgment.

The summons was dismissed, with costs.

Solicitors: *Weall & Berkley* ; and *Holman & Jones*.

(a) 12 & 13 Vict. c. 106. s. 78., *et seq.*

(b) No. 80. The affidavit of debt must state the nature of the debt with the same degree of certainty and precision as is now or shall hereafter be

required in an affidavit to hold to bail, &c. No. 80. provides that in case of noncompliance in substance with any of the rules, the summons shall be dismissed, with costs.

(c) 7 Term Rep. 550.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Feb. 28.

The insolvent had described himself as a gas-fitter, and as a gas-fitter to the Italian Opera, he had acted in the same capacity to the Sadler's Wells Theatre. — *Held*, that his description, which omitted his engagement with the theatre was sufficient. He had let lodgings upon one occasion to one person, and a debt was owing to the estate on that account. — *Held*, that he was not a lodging-house keeper. He had petitioned as John Drake Palmer the Younger, but his signature at the foot of the petition omitted the words "the Younger." — *Held*, that the signature was sufficient.

*Argument.*

## RE JOHN DRAKE PALMER THE YOUNGER.

Before MR. COMMISSIONER MURPHY.

THE insolvent, who described himself as a gas-fitter and gas-engineer, and as a gas-fitter to the Italian Opera, came up on his first examination. It appeared he was also engaged at the Sadler's Wells Theatre in the same capacity. In the list of debts owing to the estate was one for the rent of apartments which had been let to a person connected with the theatre; but the insolvent had never accepted a lodger on any other occasion. He had described himself in his petition and schedule as John Drake Palmer the Younger, but the signature at the foot of the petition omitted the words "the Younger."

*Sargood*, for the opposing creditor, contended the description was insufficient, and the signature to the petition defective. The insolvent had properly described himself as gas-fitter to the Italian Opera, but his business at the Sadler's Wells Theatre was wholly omitted. *Re Bevan (a)* was in point. Secondly, there was no description as a lodging-house keeper, although money was owing to the estate on that account. Thirdly, the signature to the foot of the petition was defective; it ought to have been John Drake Palmer the Younger, but the last two words were entirely omitted. The heading of the petition was, "The humble petition of John Drake Palmer the Younger," but the signature at the foot did not preserve the identity of the petitioner. The words in the form of petition given in the schedule to the Act, were "signed by the *said* petitioner." Who, then, was the said petitioner? John Drake Palmer the Younger; but as the signature omitted the last two words, it was quite consistent that the signature was written by the insolvent's father. It was submitted on each point the petition must be dismissed.

*Reed*, for the insolvent, contended the description and signature were sufficient. The object of the description was to identify the petitioner, and accordingly he was bound to insert the trades or businesses he had followed during the time his debts had been contracted, but the Court had never required the insertion of the particular places where the trade had been exercised in executing the order of private individuals; such a practice could answer no useful purpose, and would be peculiarly inconvenient, inasmuch as there would be no end to a description. The words "gas-fitter to the Italian Opera" were

surplusage; the trade had been already specified, and they only pointed to a particular place of employment. Secondly, the mere letting of apartments to one individual did not constitute a lodging-house keeper, any more than the selling of one loaf of bread would make a man a baker. It was an isolated transaction, and unsupported even by an intention of repetition. Thirdly, the Act of Parliament only required the signature of an insolvent to the foot of his petition. The words "the Younger," were not a part of the insolvent's signature, but of his description; but supposing they belonged to the signature, the petition must be construed as a whole, and the name at the bottom must be read with reference to the name at the top. One name only was mentioned in the heading of the petition, and the words "signed by the *said* petitioner," must, therefore, refer to that one name, which plainly identified the insolvent.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE JOHN  
DRAKE  
PALMER.

*Argument.*

MR. COMMISSIONER MURPHY, having consulted with Mr. Commissioner *Phillips*, said he should overrule the objections; the only doubt he had entertained was with regard to the signature at the foot of the petition, which omitted the words "the Younger," and he was glad the learned Commissioner whose judgment he had taken agreed in the opinion that that objection ought not to prevail.

*Judgment.*

Objections overruled.

Attorneys: *Silvester*; and *Lewis & Lewis*.

### RE JOHN FURZE COCKLE.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent had petitioned the Court as a trader owing less than 300*l*. The debts set out in the schedule amounted to 167*l*. It appeared he was possessed of some cottages at Cannington, in the county of Somerset, which he had mortgaged for a sum of 200*l*. He had mentioned the property in his schedule, but the mortgagee was not inserted in the list of his creditors.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

March 22.

In estimating the amount of a trader's debts under the Protection Statutes, debts owing to mortgage creditors must be included.

*Reed*, for the opposing creditor, said it was clear the Court had no jurisdiction, as the debts of the insolvent exceeded 300*l*.

MR. COMMISSIONER PHILLIPS. It is quite plain the debts are more than 300*l*., and I have no power to entertain the case.

*Judgment.*

Petition dismissed.

Attorneys: *Plumley*; and *Marshall*.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

March 28.

In 1853 the insolvent was discharged by the County Court at Maidstone under 1 & 2 Vict. c. 110. upon which occasion M. acted as his attorney, and agreed to take him through the Court for a specific sum. In 1855 the insolvent filed a petition under the Protection Statutes, and inserted M. in his schedule as a creditor for a portion of the sum before referred to. Upon the occasion of the first examination M. appeared to oppose, when his opposition was objected to, *inter alia*, that he had not complied with rule 3. of the Court respecting the taxation, &c. of his bill of costs. — *Held*, that inasmuch as the debt of M. arose out of a non-observance of one of the rules of Court, the Court would not permit him to oppose.

## RE HENRY STANDISH.

Before MR. COMMISSIONER PHILLIPS.

IN 1853 the insolvent had been discharged by the County Court, at Maidstone, under the provision of 1 & 2 Vict., cap. 110. The petition bore date the 28th of September in that year, and the vesting order was made upon the following day. It appeared the insolvent had agreed with his then attorney, a Mr. Morgan, to fix the costs of passing the Court at 20*l*. Consequently, no bill had been made out for taxation. 10*l*. out of the 20*l*. had been paid, and the balance was secured by a bill of exchange bearing an even date with the petition. In 1854, the bill being dishonoured, the insolvent was sued by Mr. Morgan, when he consented to an order for payment, by instalments of 2*l*. a month. The order had never been complied with, and the insolvent now came up on his first examination, under the Protection Statutes, opposed by *Reed*, on behalf of Mr. Morgan.

*Dowse*, for the insolvent, called attention to section 69., 1 & 2 Vict., cap. 110., which declared, *inter alia*, that the schedule of a prisoner should contain a full and true description of all debts due or growing due at the time of making the vesting order. In this case the bill given to the opposing creditor was dated the day before the vesting order, and ought, therefore, to have been inserted in the schedule as a debt growing due; and this Court would give no assistance to an attorney who indiscreetly permitted an insolvent to swear that his schedule contained a full description of his debts when it was within his own knowledge that one was omitted. Secondly, the third rule provided for the taxation of every attorney's bill of costs where the demand exceeded 6*l*., which bill, with the proper officer's *allocatur*, was to be delivered to the insolvent two days before the day appointed for hearing, in order, as the rule declared, "that the prisoner may be able at the hearing to take objection to such bill so taxed *ex parte*."

The object of the Court in making that rule was to protect poor and ignorant prisoners from making improvident bargains with their attorneys. Here no bill had been taxed, and it may have happened, if the rule had been observed, that the 10*l*. already paid would have been found an equivalent to the work performed. The debt of the opposing creditor was founded upon the nonobservance of an important rule of Court, and to admit his opposition would be to license attorneys to violate the rules of Court with impunity.

*Reed* submitted, with regard to the first objection, that if the



doctrine contended for prevailed, every attorney who prepared the proceedings of an insolvent would be compelled to deprive himself of a portion of his costs, inasmuch as some of the business to be done was invariably performed before the filing of the petition; consequently there would be what was called a debt either due or growing due. The bill of exchange could not turn the question; for if the attorney was required to schedule himself on account of his work and labour, he must be inserted, whether the debt was secured or not by a bill of exchange. Supposing, however, such a doctrine to prevail, it could not apply to this case; the bill was not inserted in the last schedule, and, therefore, the discharge would not operate as against the holder of it. The second objection did not apply; the rule referred to supposed the existence of a bill containing a variety of items, some of which might be disallowed on taxation, or be objected to by the insolvent on the day for hearing; but here there was nothing to tax, and no item to which the insolvent could object. If it was pretended the sum agreed upon was exorbitant, that would be matter for consideration upon the merits, but Mr. Morgan, as an admitted creditor, was entitled to be heard.

MR. COMMISSIONER PHILLIPS said, he had no reason to doubt the respectability of Mr. Morgan, or to suppose the charge he had made was other than fair and reasonable. The question before the Court was important; because if one attorney were permitted to infringe a rule of the Court, another would at once lay claim to the same indulgence, and there would be an end to all uniformity in the practice. The object of the Court in making the rule, was to give to every attorney a fair equivalent for his labour, and to protect insolvents from making improvident bargains. Every attorney who practised in the Court was supposed to know the rules which guided the practice, and inasmuch as the debt of Mr. Morgan arose out of a nonobservance of one of those rules, the Court would not permit him to oppose.

Attorneys: *C. Morgan*; and *H. M. Daniel*.

## RE CHRISTIAN DITFORT.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent came up on his first examination, supported by *Sargood*. He was described in his petition and schedule as

petition and schedule as Christian Ditford, his real name being Christian Ditfort, in which he had signed the said documents.—*Held*, that the Court could not entertain the petition.

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RELIEF  
OF INSOLVENT  
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STANDISH.

*Argument.*

*Judgment.*

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 17.

The insolvent  
had described  
himself in his

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COURT FOR  
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DEBTORS.

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DITFORT.

Christian Ditford, and the order for hearing and advertisements adopted the same name. It appeared his proper name was Christian Ditfort, and the petition and schedule were so signed. *Nichols*, for the opposing creditor, called attention to these facts, and submitted the petition must be dismissed. There was no identity between the person petitioning and the person signing the petition. The advertisements declared that Christian Ditford was to be heard on a certain day, whereas the person before the Court bore no such name. The insolvent could receive no protection under the petition, and his assignee would derive no title to his property.

*Judgment.*

MR. COMMISSIONER PHILLIPS said he regretted to be obliged to dismiss the petition upon such a point, but as there seemed to be no alternative, he must do so.

Petition dismissed.

Attorney: *Moss*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

March 14.

K. having borrowed 60*l*. for the purposes of his business, repaid the loan within three months of the date of his petition. *Held*, the payment was within the meaning of the words, "in the ordinary course of trade."

*Judgment.*

## RE HENRY DAVID KING.

Before MR. COMMISSIONER MURPHY.

THE insolvent, who described himself as a corn dealer, came up on his final examination, supported by *Sargood*. It appeared that within three months of the date of the filing of his petition he had paid to a brother a sum of 60*l*., which he stated was in respect of money borrowed for the purposes of his trade.

*Thomas* submitted the petition must be dismissed; the payment to the brother was a preference, and not within the exceptions allowed by the Act of Parliament.

MR. COMMISSIONER MURPHY. Suppose a man borrows 100*l*. for the express purpose of defraying his trade expenses, would not the money be expended in the ordinary course of his business? If the trade continues, and the money is returned to the lender, is not the repayment of it as much a trade payment as though the sum were handed to a creditor in return for goods previously received? The money was borrowed to support the business, and the goods obtained for the same purpose. I think the objection ought not to prevail.

Objection overruled.

Attorneys: *Dupliex*; and *Wardell*.

## RE MOUNSTEVEN WRIGHT.

Before MR. COMMISSIONER PHILLIPS.

THE insolvent, a petitioner under the Protection Statutes, came up for his first examination.

*Nichols*, on behalf of a creditor, who resided at Lincoln, proposed to prove by affidavit his case against the insolvent. [Mr. Commissioner *Phillips*. I do not remember such a course being pursued, and I think I have no power to receive affidavits.] Section 5. 7 & 8 Vict. c. 96. gave to this Court the like power and authority to compel the attendance of and to examine every person capable of giving any information concerning the person, trade, business, or calling, dealings, or property of such petitioner, or any information material to the full disclosure of the dealings of such petitioner, as by any law now in force relating to bankrupts are possessed by the several Courts authorized to act in the prosecution of fiats in bankruptcy touching the seizure of property and the examination of any bankrupt, or other person under a fiat in bankruptcy. Sect. 4. 10 & 11 Vict. c. 102. transferred to this Court all power, jurisdiction, and authority which the Court of Bankruptcy possessed under the several statutes enumerated in that section. Before that power was transferred, the Court of Bankruptcy had authority in all matters within their jurisdiction to take the whole or any part of the evidence, either *vivâ voce*, on oath, or by interrogatories, in writing, or upon affidavit (a), and that power was re-enacted by section 245. 12 & 13 Vict. c. 106., the Bankruptcy Consolidation Act.

MR. COMMISSIONER PHILLIPS. Section 5. 7 & 8 Vict. gives to this Court the same power to examine witnesses as is possessed by the Court of Bankruptcy. The power is limited according to the words of the section, which point only to an examination. The words are "to examine every person capable of giving any information," &c. There is nothing said of evidence by affidavits, and I am of opinion that I have no power to receive them.

Affidavits rejected.

Attorneys: *Nicholls*; and *Clark*.

(a) 5 &amp; 6 Vict. c. 122. s. 68.; 6 Geo. 4. c. 16. s. 46.

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COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 10.

This Court has no power to receive affidavits in opposition to a petitioner under the Protection Statutes.

Argument.

Judgment.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

April 25.

Where an insolvent fails to describe himself according to the business or occupation he follows, the Court will dismiss the petition. F., a fisherman, was the owner of twelve fishing smacks, which he used for the purposes of that pursuit, and occasionally, when there was room to spare, he brought home the fish of other persons, and was paid for the conveyance: *Semble*, that the ownership of the smacks, and the occasional conveyance of fish for other persons for a profit, would not constitute a trading within the meaning of the Bankrupt Laws as a shipowner or a carrier.

## RE THOMAS ROBERT FORGE.

Before MR. COMMISSIONER MURPHY.

THE insolvent, who had described himself as a fishing-smack owner having a warehouse at the waterside, Barking, came up on his first examination. He had petitioned as a non-trader. It appeared he was the owner of twelve smacks, which he employed on the coast of Holland in fishing for turbot. The smacks were duly registered, the average tonnage being from fifty to sixty tons. The insolvent did not go to sea himself, but he manned the smacks, paid the wages of the respective crews, and furnished the necessary stores. The fish were sent to his factor, who sold them, and remitted to him the proceeds. He never bought fish to complete a cargo, but occasionally, when there was room to spare, the smacks brought home the fish of other persons, which were delivered to the factors of the respective owners, who sold them, and paid a fourth of the profits for the conveyance. He had received on this account a variety of payments during the present year.

*Nichols*, for the opposing creditor. The insolvent having petitioned as a non-trader, the question arose whether he was a trader as a carrier and shipowner. The case of *Heanny and Another v. Birch* (a) decided that where it was the practice of a class of fishermen to buy fish of other boats at sea, and to sell them on shore, one of them, who was proved to have done so once, was a trader within the meaning of the Bankrupt Laws, and on the same principle, as it was the practice amongst fishermen to convey fish for each other for a profit, the having done so occasionally was sufficient to bring the insolvent within the meaning of the Bankrupt Laws. That practice was not incidental to the pursuit of a fisherman, but was followed for the profits which attached to the conveyance. *Re George Stubbs* (b) might be relied upon by the other side, but an examination of that case would favour his argument. There the insolvent was the owner of several smacks, but he had described himself as a fisherman, and the judgment which decided him not to be a trader, was founded upon the principle that the smacks were ancillary to the business he followed. It seemed to have been conceded that had the insolvent not been a fisherman, the ownership of the smacks would have brought him within the meaning of the Bankrupt Laws. In this case the insolvent had not described himself as a fisherman. The question of the insolvent being a carrier did not depend upon the quantity of the goods conveyed, for even the limited

(a) 1 Rose Bank. Cases, 356.

(b) 22 L. T. 291.

dealings of a farmer would make him a trader, but for the express exemption in the Bankrupt Laws; and so with a schoolmaster, but for the doctrine which made the purchase and sale of books for the use of the school ancillary to that particular occupation. In *Schoyn's Nisi Prius* (a), masters and owners of ships, hoymen, wharfingers, lightermen, barge owners, proprietors of waggons, stage coaches, &c., were all denominated common carriers, and it was important to observe that it was not until 5 & 6 Vict. c. 122. that carriers and shipowners were included by name in the list of traders subject to the Bankrupt Laws. If the insolvent was not a carrier, he was a shipowner. [Mr. Commissioner *Murphy*. I take the meaning of the word shipowner to be where a man owns vessels, which he employs either for his own purposes or for the benefit of others in conveying goods from one part of the world to another.] It was submitted the word had a more extensive meaning: there were hundreds of steamers plying up and down the Thames, and a multitude of vessels engaged in the herring fishery at Yarmouth, and unless the word shipowner applied to the proprietors, they could not be brought within the meaning of the Bankrupt Laws. So with the vessels engaged in the whale fishery: the owners were essentially fishermen, and as to the ships being ancillary to that pursuit, they were indispensable; the business could not be carried on without them. There were carriers by water as well as by land, and when shipowners and carriers were separately mentioned in the same clause (b), it was but reasonable to suppose that the two expressions did not mean the same thing. The word shipowner must be taken in the larger signification, and, to give effect to the Bankrupt Laws, must be taken to include the proprietors of the different vessels to which he had last alluded. [Mr. Commissioner *Murphy*. The evidence shows the insolvent to be a fisherman, but he has not so described himself. Is not that omission fatal?] It was submitted the insolvent ought so to have described himself.

*Dowse* and *Sargood*, for the insolvent, contended he could not be considered as a carrier or a shipowner within the meaning of the Bankrupt Laws. *Heanny and Another v. Birch* did not apply. There the owner bought fish, which he sold again at a profit; in this case there was no buying. In the ordinary sense of the word, a carrier was one who conveyed goods from one known terminus to another, at a fixed and known rate of remuneration; but in this case the accommodation of conveyance was only afforded at uncertain intervals, and the remuneration

(a) 4th edit. 378.

(b) 12 &amp; 13 Vict. c. 106. s. 65. ;

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COURT FOR  
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DEBTORS.

RE THOMAS  
ROBERT  
FORGE.

*Argument.*

depended upon a fluctuating market. Although a person might get a living by the conveying of goods, he was not of necessity a carrier. *Brind v. Dale* (a) was in point. There it was ruled that a town carrier, not conveying goods from any one known terminus to another, nor at any fixed rate, nor the goods of several persons at the same time, but plying in the streets, and undertaking jobs as he could get them, was not a common carrier. If the defendant, in the case cited, did not come within the meaning of the word carrier, how could the insolvent, who only accommodated his brother fishermen, when his smacks had a little room to spare? It was well known that vessels engaged in trade were subject to certain dues, but these smacks were exempted from all such payments. Supposing the insolvent had hired boats to bring home his fish, that certainly would not have brought him within the Bankrupt Laws. How, then, could the use of his own boats for the same purpose? The ownership alone of a boat could not constitute a trading; for if so a farmer who bought a boat to carry manure would be a trader? [Mr. Commissioner *Murphy*. If the insolvent had described himself as a fisherman, you then could have argued that the ownership of the smacks was incidental to his calling, but he wholly omits that description, which appears to me to be fatal.] The description, "fishing-smack owner," must be taken in its largest signification, namely, one who owned smacks which he used for the purposes of fishing.

*Nichols*, in reply. The nonpayment of dues had no bearing upon the question of trading; that resulted from the same considerations which exempted a waggon bearing manure from toll. The insolvent carried for any one who would take advantage of his half-laden smacks, and there was no difference between him and a man who carried goods to Australia. Supposing the goods to have been lost by the incompetency of the crew, or the deficiency of the master, the insolvent would have been liable in an action.

MR. COMMISSIONER MURPHY said if he took the petition as it stood, the insolvent was within the Bankrupt Laws, but he had placed himself in that dilemma by omitting his proper description, which was a fisherman. The Court had no alternative but to dismiss the petition on that account; but had the insolvent inserted his proper description, the Court would not have considered him either as a shipowner or a carrier. To constitute a carrier, a man must hold himself out to the world in that character, and carry goods for all comers. Here the main business

(a) 2 M. & Rob. 80.

was fishing. The smacks went to Holland for that express purpose, but the chances of fishing not always proving successful, they sometimes brought home the fish belonging to other persons. That was his present opinion, but the description being clearly insufficient, he must dismiss the petition.

Petition dismissed.

Attorney: *Silvester*.

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RE THOMAS  
ROBERT  
FORGE.

## RE HORATIO CLAGETT.

Before MR. COMMISSIONER MURPHY.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 6.

*SARGOOD*, on a former day, had obtained a rule calling upon John Mortimer and Sidney Alexander Wylie, assignees of the estate and effects of the said insolvent debtor, to show cause why they should not execute a reassignment of his estate and effects to the said insolvent debtor, or to such other person as this Court may direct; and why the warrant of attorney executed by the said insolvent debtor in pursuance of the statute, should not be cancelled, or satisfaction entered on the judgment entered up (if any) on the said warrant of attorney, the said insolvent debtor having since his insolvency become bankrupt, and obtained his certificate, on payment of the costs of such re-assignment to the assignees.

In 1836 C. petitioned this Court under 7 Geo. 4. c. 57., and was discharged. In 1854 he was adjudicated a bankrupt, and obtained his certificate.—*Held*, that the certificate in bankruptcy did not discharge and satisfy the debts owing under the insolvency.

From the affidavit filed on behalf of the assignees on showing cause, it appeared that in June 1835, the insolvent had petitioned the Court under 7 Geo. 4. c. 57., and was discharged on the 10th of August following. He had subsequently petitioned upon two occasions, and afterwards, having been engaged in business as an ocean float manufacturer, he was adjudicated a bankrupt on the 26th of July 1854, and obtained his certificate under the Bankrupt Law Consolidation Act on the 23rd of November in the same year. Under the will of his father, which bore date the 5th of November 1815, a sum of 5000*l*. was bequeathed unto Thomas William Clagett and three other persons in trust to apply the dividends during the life of the testator's daughter, Mary Kymer, to her separate use; and in case she happened to die during the lifetime of her husband, then in trust to apply the annual proceeds during his life to his own use and benefit; and after the decease of the survivor of them, upon trust to assign and transfer the said sum for the benefit of the children of the said Mary Kymer and her husband; and, in default of issue, then the said sum was to sink into and be considered a part of the residuary personal estate,

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*Statement.*

and be disposed of accordingly. And the testator bequeathed his personal estate, &c., unto and for the benefit of such of his ten children who should be living at the time of his decease, to be divided amongst them, yet so that the shares of the sons should be double the amount of the shares of the daughters; and the will further provided that all sums of money, &c., to which the said Mary Kymer might become entitled by virtue thereof over and above the 5000*l.* should be held by the trustees upon the same trusts, for the benefit of the said Mary Kymer and her husband, and issue, and, failing issue, should sink into the residuary estate of the said testator, and be disposed of as thereinbefore declared. In December 1815 the testator died, and the will was proved by his executors in the Prerogative Court of Canterbury on the 26th of June 1816. Upon the filing of the insolvent's petition in June 1835, he conveyed and assigned to the provisional assignee all his estate, right, title, interest, and trust in and to all his real and personal estate and effects in possession, reversion, remainder, and expectancy (excepting his wearing apparel, &c., of the value of 20*l.*). And by an indenture bearing date the 22nd of August 1836, the said estate, right, title, &c. were assigned to the sub-assignees for the benefit of creditors. On the 30th of November 1836, judgment was entered up on the warrant of attorney for 71,841*l.*, the amount of the insolvent's debts. The interest which he took under his father's will was not disclosed in the schedule, and the assignees were wholly unacquainted with the existence of such an interest up to the period of this application, whereupon inquiries were instituted, which resulted in its discovery; and it then appeared the testator's daughter had survived her husband, and died without issue in October 1854, upon which the executors paid over to the assignee in bankruptcy 3428*l.* 13*s.* 9*d.* as the insolvent's proportion of the said legacy. On the 1st of May 1855, notices were served on the executors, and the assignee in bankruptcy claiming the legacy on behalf of the creditors under the insolvency.

*Argument.*

*Nichols* and *Reed* now showed cause. The real object of the rule was to deprive the assignees of their title to the legacy. That it vested in them, as a reversionary interest under the assignment, was beyond all question; and it was submitted the subsequent bankruptcy in no way affected their rights. In 1835 the insolvent's interest was capable of sale, and but for the omission in the schedule, a dividend might have been realised for creditors. Previously to the passing of 7 Geo. 4. c. 57. the question before the Court might have been attended with difficulties; but section 13. of that statute provided the



title of this Court should not be avoided by a bankruptcy unless it occurred before the gazetted day of hearing, or within two calendar months from the vesting order; and section 74. of the Bankrupt Law Consolidation Act contained a similar provision. It was true, in *Ex parte Garnett* (a) the *Chief Judge of the Court of Review* spoke of the validity of an assignee's title under an insolvency, as a matter undecided in a case where the fiat was nearly eleven months after the vesting order, and nine and a half after the adjudication, adding, he declined to give an opinion whether the assignees under the bankruptcy were entitled to recover property from the assignee under the insolvency. But the learned *Chief Commissioner*, commenting upon that case, in an elaborate judgment, said, "No reasons were given for thinking the words of the statute to be ambiguous, and I abide by my opinion that they are perfectly clear." (b) No person could doubt the meaning of that provision, and the Court of Chancery would assist the assignees in asserting their title to the legacy. They had been guilty of no negligence; on the contrary, immediately they became aware of its existence they had served the executors and assignee in bankruptcy with a notice of their claim. A reassignment to the insolvent would convey to him or the assignees in bankruptcy, the legal title to the legacy, and thereby render it impossible for the assignees under the insolvency to assert their rights. Even if the opinion of the Court favoured the rule, it was apprehended no decision would be given until the assignees had had an opportunity to assert their claims. Section 62. gave to this Court the power to direct a reassignment to the insolvent, provided all his debts were paid and satisfied; and *Sturgess v. Joy* (c) decided that this Court alone had jurisdiction to determine whether the debts were discharged and satisfied or not. The statute regarded the assignee as a trustee for the accomplishment of a particular purpose, namely, the payment of debts, and invested him with the perfect control of an insolvent's property — present property absolutely, future property in the event of the debtor's ability to pay. The most superficial examination of the Insolvency Laws proved the Legislature contemplated a continuance and permanency of his title until the trust was fulfilled. Was, then, the accidental circumstance of a bankruptcy twenty years after an insolvency to disturb that trust? Section 21. gave to this Court the power to raise money on mortgage when it was inexpedient to sell an insolvent's estate, and to manage the pro-

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(a) 1 De Gex, 98.

(c) 23 L. J. Q. B. 25.

(b) *Re J. H. Hance and J. Roby*,  
1 Insolv. Cases, 130.

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CLAGETT.

Argument.

erty until payment of the creditors had been effected. Section 22. empowered the granting of leases; and section 29. entitled the Court to set aside a portion of the pay, half-pay, &c. of naval, military, or civil officers, and to apply the same in the payment of debts. Was it not inconsistent with these sections to argue the debts could be satisfied by a certificate? What assignee would raise a small sum on mortgage for the benefit of the creditors, if the effect of a subsequent bankruptcy was to destroy his title to the property altogether? Would he not realise the estate, and divide the proceeds whilst yet his title was secure? The direction of the Court with regard to half-pay was to continue until the contrary was ordered. Yet, if the certificate operated as a satisfaction of these debts, that direction would be wholly disregarded. Who would purchase an insolvent's estate if a bankruptcy could vacate the assignee's title at any time? And how could an assignee covenant for a title which at any moment might be thus interrupted? Section 115. 12 & 13 Vict. c. 106. enacted that no bankruptcy should be annulled by reason of its being concerted, and it might therefore happen if a certificate satisfied every debt that at the end of a long and expensive suit, and just when the provisional assignee was about to receive a considerable sum as the result of litigation, that a bankruptcy would be concerted and a certificate obtained, which would give the bankrupt the money, and the assignee would be left to pay the costs. Notwithstanding the decisions in *Jellis v. Montford* (a), *Ex parte Barrington* (b), and *Ex parte Fenwick* (c), it was submitted the debts inserted in an insolvent's schedule could not be proved under a subsequent bankruptcy. In each of those cases it was laid down that inasmuch as an insolvency did not extinguish a debt, it was kept alive for all purposes, and consequently for proof in bankruptcy; but such a doctrine was wholly inconsistent with the policy of the Insolvent Laws. The effect of a discharge was to alter entirely the character of the debt. The creditor could neither sue nor institute a suit. If he arrested the insolvent, section 60. provided he should be released upon application to a Judge. And an execution against his goods would be inoperative, for it was provided that his property should not be liable, except under the order of this Court. The creditor could not, even by taking a new security, enforce the payment of the debt. Did not these provisions show the ordinary incidents of a debt were destroyed? If such a debt could be proved in bankruptcy, upon the same principle it could be proved under a second insolvency, but the

(a) 4 B. & A. 257. (b) 2 Mont. & Ayr. 254. (c) 2 Mont. & Ayr. 281.

practice of this Court had uniformly rejected such proofs. The entering upon trade, coupled with the accident of a bankruptcy, according to those decisions, invested the creditors with rights which the Legislature had taken away. The statute declared there should be no suit, except upon the judgment under the control of the Court, and then only "if it shall appear that the debtor is of ability to pay;" but those cases declared there might be suit by enforcing a bankruptcy, and thus the very inability to pay gave to the insolvency creditors the power of setting the Legislature at defiance. Lord *Eldon*, in *Ex parte Dewdney* (a), said: "A commission of bankruptcy is nothing more than a substitution of the authority of the *Lord Chancellor*, enabling him to work out the payment of those creditors, who could, by legal action or equitable suit, have compelled payment, and the objection upon the Statute of Limitations must be sustained." In this case the creditors were expressly prohibited from compelling payment by legal action or equitable suit. Section 164. of the Bankrupt Act provided that every creditor might prove his debt by his oath . . . . and the Court had power to examine upon oath, &c., every person claiming to prove a debt. It was evident the words "creditor" and "debt" were there used in their ordinary signification, for section 171. provided that mutual debts and credits might be set off. Suppose a scheduled creditor should contract a debt to an insolvent after his discharge, could the debts be set off the one against the other? It was apprehended they could not. An ordinary debt was barred in six years, but the statute had no effect upon debts inserted in a schedule. It was submitted section 164. and the following sections, with respect to proof of debts, must be construed in connection with sections 200. 202. 204. and 205. The latter section declared "that any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him, for any debt, claim, or demand proveable under his bankruptcy, shall be discharged upon entering appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence." Did not that section show the debts to be proved were such as might, but for the certificate, involve the debtor in actions, or admit of his arrest? But a discharged insolvent needed not protection; he was already protected. It was a principle of the English law that no man should be punished twice for the same offence; but if such a debt could be proved, the creditor could oppose, and the result would be that a debtor might be punished twice for the same offence. Suppose the

(a) 15 Ves. 498.

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Argument.

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DEBTORS.

RE HORATIO  
CLAGETT.

*Argument.*

bankruptcy of a debtor who, some years before, had been remanded by this Court for contracting a debt by fraud or false pretences. A vindictive creditor might again prove the same offence, and the result would be a refusal of further protection, and a suspension or refusal of the certificate. Section 256. was imperative, and left the Court of Bankruptcy no choice. The creditor, then, had a right under section 257. to ask for a certificate upon which he could arrest the debtor. The question before the Court was not altogether new, for it had been incidentally considered by the *Chief Commissioner*, in *Re Hance*, and his opinion was recorded that such debts were not proveable, and that a certificate did not affect them. It was submitted the Bankruptcy and Insolvency Statutes were wholly independent of each other, and were to be considered and construed separately. To construe them together would lead to continual difficulty and inconvenience, and render many of their provisions wholly inoperative.

*Sargood*, in support of the rule. The question before the Court was purely a question of law, and would be considered irrespectively of the conflicting claims between the assignees in bankruptcy and insolvency. A certificate was never a thing of accident, as it had been termed, but could only be obtained after a careful examination; and even then the Court had the power, under section 198., "to annex such conditions thereto as the justice of the case may require." A condition might have been annexed that the judgment entered up on the warrant of attorney in this Court should not be affected; but the certificate having been granted unconditionally, the question was whether it did not operate as a discharge and satisfaction to the debts owing under the insolvency. Section 200. provided "that the certificate of conformity allowed under this Act, subject to the provisions herein contained, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy." The point, then, he had to establish was, that these debts were proveable, and consequently were discharged by the certificate. In 1821, *Jellis v. Montford* decided "a creditor of an insolvent trader may, after the debtor's discharge under 53 Geo. 3. c. 102. take out a commission of bankruptcy against him, and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt at Law to support the commission." That case was followed, in 1835, by *Ex parte Barrington*, where it was again decided, "If a trader take the benefit of the Insolvent Debtors Act, a creditor whose debt is inserted in the schedule may afterwards issue a fiat on that debt against the

trader." It should be remembered that that decision, and others to which he should refer, were subsequent to the enactment of section 13. 7 Geo. 4. c. 57. In 1836 it was laid down in *Ex parte Fenwick*, "A creditor, whose debt is inserted in the debtor's schedule, on his passing the Insolvent Debtors' Court, may prove that debt under a subsequent fiat against the debtor." If any doubt had existed on the law of the question, or if the cases referred to had been incorrectly determined, ample time had been afforded for consideration before and after the argument in *Watson v. Humphrey* (a), in 1855; but that case again upheld the former decisions, and decided "A creditor of the insolvent trader may, after the debtor's discharge under 1 & 2 Vict. c. 110., present a petition for an adjudication of bankruptcy against him, and his debt, although included in the insolvent's schedule, will be a sufficient petitioning creditor's debt at Law to support the adjudication." Each of those cases declared the right of creditors to go to the Court of Bankruptcy, and to partake of all the advantages to be derived from an adjudication, notwithstanding the insertion of their debts in the debtor's schedule, under an insolvency. The law, then, having declared such debts to be proveable, he should next show the effect of a certificate upon them and the property and person of the debtor. In *Bamford v. Burrell* (b), Buller J. said, "We are of opinion that debts proveable under the commission, and debts to be discharged by the certificate are convertible terms." *Scott v. Ambrose* (c) further exemplified the effect of a certificate. There a defendant was sued for a debt before his bankruptcy, and the plaintiff went on with his suit after the bankruptcy, and got judgment, and the defendant obtained his certificate, and afterwards brought a writ of error, which was *non prossed*, and the costs of the *non pros* in error were awarded against him; yet it was held that the certificate discharged the defendant from these costs. That decision was pronounced in 1814. In 1815 *Wall v. Atkinson* (d) decided that an order of the Court of Chancery for payment of a sum of money could be proved under a commission, and was barred by a certificate; and the Court, considering the effect of a certificate, went so far as to order the discharge out of custody of the bankrupt, although he was committed upon an attachment for disobedience to the order. In 1823, in *Ex parte Eiche* (e) a discharge was ordered to a bankrupt who had obtained his certificate, but who had been previously committed under an

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(a) 24 L. T. 291.  
(b) 2 B. & P. 11.  
(c) 3 M. & S. 326.

(d) 2 Rose, 196.  
(e) 1 Gly. & J. 261.

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order in bankruptcy for disobedience to an order for payment of money. In 1833, in *Davis v. Shapley* (a), it was held that the goods as well as the person of a certificated bankrupt were protected; and goods acquired after the bankruptcy, having been seized under a *fi. fa.* issued upon a judgment in respect of a debt due before the bankruptcy, the Court set aside the *fi. fa.* What could be a stronger declaration of the protection granted by a certificate? In that case, *Bayley J.* said, "A bankrupt, who has complied with the conditions mentioned in the Act, is to be discharged from all debts due by him when he became bankrupt. If, after his bankruptcy, his goods were to remain liable to be seized and sold in order to satisfy a debt due at the time when he became a bankrupt, he could not be said to be discharged from the debt." And *Parke J.* said, "The bankrupt is discharged, not merely from the debt, but from all remedies for the recovery of it." In the same year, in *Barrow v. Poile* (b), where the after-acquired goods of a certificated bankrupt had been taken in execution for a debt which might have been proved under the commission, the Court set aside the *fi. fa.*, and refused to put the bankrupt to an *auditâ querelâ*, although it was stated on behalf of the creditor, that the bankruptcy was collusive, and that in an action by the assignees, a jury had found against the plaintiffs as to the fact of the trading. In that case *Tenterden C. J.* said, "The effect of the certificate is to discharge the bankrupt from every demand proveable under the bankruptcy." In 1835, *Ex parte Holt* (c) still further exemplified the effect of a certificate. In that case, A. and B. were trustees; A. misapplied the trust funds, and afterwards a commission issued against him, under which he obtained his certificate. No proof was made by the *cestui que trust*, as the bankrupt concealed the fact of having misapplied the funds, and continued to pay the interest. Subsequently, the breach of trust was discovered. Yet it was held the certificate was a bar to any proof under the fiat. In 1850, in *Re Wetherell* (d), it was ruled that arrears of poor rates due from a bankrupt before his bankruptcy were proveable under the fiat, and the certificate was held to be a bar to the levying the amount under statute 43 Eliz. c. 2. by distress and sale of his subsequently acquired goods. It was, therefore submitted the debts due under the insolvency were proveable under the bankruptcy, and were discharged by the certificate.

*Cur. adv. vult.*

(a) 1 B. & A. 54.

(b) Ibid. 629.

(c) 2 Mont. & Ayr. 562.

(d) 19 L. J. M. C. 115.

MR. COMMISSIONER MURPHY. This is a rule calling on the assignees of the estate and effects of Horatio Clagett, to show cause why they should not execute a reassignment of his estate and effects, and why the warrant of attorney, executed by the said insolvent, should not be cancelled, or satisfaction entered on the judgment entered upon the said warrant of attorney, the debtor having, since his insolvency, become bankrupt, and obtained his certificate. The circumstances under which the application is made are these:—The applicant, Mr. Clagett, took the benefit of the Insolvent Act in 1836; and while the debts under his insolvency were still due and unpaid, having subsequently entered into trade, he was adjudicated a bankrupt, and obtained his certificate. The case of *Jellis v. Montford* confirmed by a recent case of *Watson v. Humphrey*, in the Exchequer, decided that, notwithstanding a discharge under the Insolvent Debtors Act, the debts of the insolvent must be considered as still subsisting and proveable under a subsequent bankruptcy. The Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. s. 200., enacts “That the certificate of conformity allowed under the Act, subject to the provisions herein contained, shall discharge the bankrupt from all debts due by him when he became bankrupt, and from all demands and claims made proveable under the bankruptcy.” At the time of taking the benefit of the Insolvent Act, Mr. Clagett executed the usual warrant of attorney, authorizing a judgment to be entered up against him for the amount of the debts in his schedule, and judgment has been entered up on that warrant of attorney. I am now called upon, under section 62. of Geo. 4. c. 57., to order satisfaction to be entered on that judgment, on the ground that all the debts in respect of which the adjudication of insolvency was made, have been discharged and satisfied by the operation of the certificate of conformity in bankruptcy. The object of the warrant of attorney and of the judgment thereon, as shown by section 57. of Geo. 4. c. 57. is to provide for the payment of the debts of the insolvent, if at any time thereafter he shall be of ability to pay them; for that same section provides that “such further proceedings shall and may be had upon such judgment as may seem fit to the discretion of the said Court from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained shall have been fully paid and satisfied.” It is plain, therefore, that the judgment is in the nature of a collateral security, whereby the insolvent may be compelled to discharge his debts, if it shall appear to the Court at any time that he shall be able to do so. The real question in the case, therefore, will be, what is the

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meaning of the words in the 12 & 13 Vict. c. 106. s. 200., viz., "that the certificate shall discharge the bankrupt from all debts due," &c. If that is to be read as a legislative declaration that the effect of the certificate shall be to obliterate and extinguish all the debts of the bankrupt, then without any doubt the consequence would be that the debts in the insolvent's schedule would be included in such a sweeping annihilation. I think it, however, impossible to suppose that such is the meaning of the section. Indeed, the section itself, in its subsequent members, clearly establishes this, because it goes on to enact that "no such certificate shall release or discharge any partner or co-contractor with the bankrupt." This appears to me to prove satisfactorily that the meaning of the word "discharge" is merely to relieve the bankrupt from all process in respect of such debts, but not to extinguish the debts themselves. Section 204. of the Bankrupt Act equally provides that after certificate the bankrupt shall not be liable on any promise to pay or satisfy any debt from which he shall be discharged by virtue of such certificate. Section 60. of 7 Geo. 4. c. 57. enacts that no person entitled to the benefit of the Act shall be imprisoned for any debt in the schedule. The effect of both Acts, *mutatis mutandis*, appears to me the same, viz., that the certificate in the one case, and the discharge in the other, only amounts to a relief from process, and not to an extinguishment of the debts upon which either the certificate or the discharge operates. It is equally remarkable that the very section, the 62nd, under which this application is made, uses the very word "discharged," coupled with the word "satisfied," showing clearly that the Legislature looked to no discharge short of a satisfaction. Such satisfaction I conceive to be, first, a payment, or a satisfaction operating by way of estoppel, viz., a release. Indeed, that such is the intention is clear from the concluding words of section 62., ordering that any deed of release, to be recorded in the said Court, by which any such debt or debts shall be released or discharged, shall not be liable to stamp duty. On all these grounds, therefore, I am of opinion that the debts are not discharged and satisfied by the certificate in bankruptcy, and for that reason this rule must be discharged. I may add that this may be taken as the collective opinion of the Commissioners.

Rule discharged.

Attorneys: *Bird* and *Lewis & Lewis*.



## RE REUBEN MICHAEL.

Before THE CHIEF COMMISSIONER.

*SARGOOD*, on behalf of the insolvent, applied for leave to file a petition, under section 8. 10 & 11 Vict. c. 102. For a period of eighteen months he had been travelling with his wife on the continent for the benefit of her health. He had returned to England about five weeks since, and he now desired to file a petition for protection. The question of jurisdiction in similar cases had already been before the Court, but the Commissioners had differed in their opinions upon the subject. In *Re Crotty* (a) the petition was sustained although the insolvent had resided two months out of the six immediately preceding the filing of his petition at Ostend. In *Re Edwards* (b) the insolvent had resided four months out of the six at Belgium, and in that case the petition was dismissed. There were other cases on the point, which were collected and reported in *Macrae's Practice*, 54.

THE CHIEF COMMISSIONER said: I am required to say whether a man, landing in England after a residence abroad, can immediately file a petition under section 8. of 10 & 11 Vict. c. 102. As the question arises upon a proviso which controls the enactment of a prior clause, it is first to be seen what the law would be without this alteration. As the law stood before this statute, it was a necessary qualification for petitioning for the protection of an interim order, that the party should have been residing for twelve months in the district where he petitions. By the new Act, the required residence is reduced to six months. No man, under the leading clause, can petition without a residence for the last six months in England, and within the same district. The 8th clause provides a further shortening of time. It provides a mode of petitioning where the six months' residence has not been all in one district. Any shorter period, however, is deemed insufficient as a criterion of the district where the jurisdiction should be exercised. So it is provided, as a safeguard against abuse, that this Court, on examination of the schedule, and seeing who are the creditors, shall name the district which may most fitly take cognizance of the case. This further question is now proposed, whether any previous residence whatever is requisite in this country? If it is not, a man, who was never in England before, might land at

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May 10.

M., who had been travelling on the Continent for a period of eighteen months, returned to England, and, five weeks afterwards, applied for leave to file a petition under sect. 8. of 10 & 11 Vict. c. 102. Held, that he was not entitled to petition under that section, and the application was refused.

Judgment.

(a) *Macrae's Insolv. Practice*, 55.(b) *Ibid.* 59.

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*Judgment.*

Dover in the morning, and take out his protection in the afternoon. This might happen to be convenient to one who, though living abroad, has contracted debts with persons of this country, and wishes to live here without molestation. I certainly think that such an accommodation to absentees is not within the spirit and intention of the Act. Why was twelve months required at first, and why six months now? Why is any period of residence prescribed? For two reasons: first, that a man may be heard where his creditors most probably reside; secondly, that he shall not be able to keep out of their reach for a period preceding the moment of petitioning. Moreover, if a man has absented himself some months before the time which he elects for petitioning, it is likely that his property may also have absented itself, and become difficult of detection. A man living in England chooses his own time for resorting to this process; but he is expected to have been within reach of his creditors for some previous period. The words of the Act are, "if any such insolvent shall not have so resided for six months in any one place as aforesaid." It is contended that we are to read this as if the words were "shall not have resided for six months in any of the places aforesaid." I cannot agree to this. I think that "shall not have so resided in any one place as aforesaid" imports that he must have resided "partly in one and partly in another," that "not in any one" means "in some or other, though not in any one." If it had been contemplated by this clause to make residence in or out of England a matter of indifference, it might easily have been expressed in words, and it would not have been expressed in the words that are used. The proviso is meant to give some relief from the previous restriction. It relieves a man from the restriction of having lived for six months in one only of the specified jurisdictions, but not from the restriction of having lived in some of them. Moreover, "such insolvent" means a man capable of petitioning under the previous part of the Act. The definition of the capacity to petition, as previously given, is indeed altered by this 8th clause; but, excepting as altered, it remains as it was. Accordingly, it seems to me that he must still be a resident for six months in the insolvency districts, though he is no longer limited to "any one as aforesaid." I think, as I did some years ago, that he cannot petition.

Attorney: *J. Frost.*

## EX PARTE BILSON. RE STEELE.

THIS was a petition to discharge an order transferring the proceedings in the bankruptcy of M. R. Steele, a draper at Leicester, from the Birmingham District Court to the London District Court.

The order was made on the 11th of April 1855, on the *ex parte* application of Messrs. Ellis, Everington, and Company, by Mr. Abrahall, a registrar (a) of the Court of Bankruptcy for the London district, and was signed "J. B. H. Abrahall, Registrar, for T. S. M. Fonblanque, Commissioner, in the absence of the Senior Commissioner."

There was no evidence as to the circumstances under which this order was obtained beyond the bare facts that when it was made the *Senior Commissioner* was absent from illness, and no Commissioner was sitting, and that it was made, *ex parte*, on an application supported by an affidavit stating the circumstances which rendered a transfer desirable. On the 13th of April the proceedings were transmitted to London, and the official assignee appointed by the Birmingham Court was removed, and another appointed in his stead.

The present petitioners, who were country creditors of the bankrupt, applied on the 23rd of April to the *Senior Commissioner* to discharge this order on the ground that the Registrar had no jurisdiction to make it, but the *Commissioner* held that he had no authority to interfere. The proceedings were accordingly carried on in the London District Court, and, on the 25th of April, creditors' assignees were chosen without opposition. On the 5th of May the greater part of the bankrupt's stock-in-trade was sold in London.

On the 21st of May the present petition was served.

Mr. J. V. Prior and Mr. J. Bell (of the Common Law bar), for the petition, said that the main object of the appeal was to check the practice of obtaining orders of this kind from the Registrars, on *ex parte* applications. It could not be the intention of the Legislature that these orders should be made by the Registrars without some reason being shown why a Commissioner was not applied to. If they were to be made *ex parte*, as a matter of course, by a Registrar, because no Commissioner was at the moment sitting, parties would, in many cases, watch the Commissioners out of Court, in order to obtain an oppor-

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JUSTICES.

June 4.

Where, on the *ex parte* application of a creditor, an order for the transfer of a petition for adjudication, and the proceedings thereunder, from a country District Court to the London District Court was made by one of the Registrars as deputy for one of the London Commissioners during the absence of such Commissioner, and also of the Senior Commissioner;

*Quære*, whether, in the absence of circumstances showing urgency, such an order would be sustained if questioned without delay, and before any steps are taken under it.

*Argument.*

(a) See 12 &amp; 13 Vict. c. 106. ss. 20. 27. and 90.

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tunity of applying to some Registrar who was known to entertain views favourable to their application.

As to the merits, they said that the only reason alleged for the order was that the majority in number and value of the creditors lived in the London district; which was not a sufficient reason: *Ex parte Downes*. (a) They referred also to *Ex parte Mitchell* (b), *Anon.* (c), *Re Grylls* (d), and *Ex parte Sewell* (e); and contended that, under the circumstances of the case, the bankruptcy could be more advantageously prosecuted in the Birmingham Court, to which it properly belonged.

*Judgment.*

THE LORD JUSTICE KNIGHT BRUCE said that so far as he could form an opinion, after having heard only one side of the case, he doubted the expediency of orders of this kind being made by the Registrar, and the propriety, and even regularity, of their being made *ex parte*, except in cases of urgency. He should, however, leave these points undecided, as also the question what it would have been right to do if the matter had been earlier brought before the Court, or if the circumstances of the estate had been different. Considering that the order complained of had been made on the 11th of April, and a great deal had been since done under it, with respect to the estate, the application must be refused. Subject, however, to what might be urged on the part of the respondents, the costs of the present petition must be given out of the estate.

THE LORD JUSTICE TURNER shortly expressed himself to the same effect.

Mr. *Bacon*, for the assignees, and Mr. *Malins*, for the creditors who had obtained the order complained of, were then heard in support of the order on the merits, with a view to the question of costs.

THE LORD JUSTICE KNIGHT BRUCE said that he continued to doubt the regularity of the original order made by the Registrar, but did not mean to decide the point. He doubted it on both the grounds he had already mentioned. Independently of these grounds, he doubted whether the order was justified by the circumstances of the case. He thought, however, that, as matters had gone so far, it was for the benefit of the estate to leave things as they were, but the costs of the petition must come out of the estate.

(a) 1 De G. 390.  
 (b) 3 M. D. & De G. 397.  
 (c) Mont. & Chitty, 142.

(d) 17 L. J. (Bankruptcy) 7.  
 (e) 3 De G. M. & G. 508.

THE LORD JUSTICE TURNER said that he entirely agreed with his learned Brother. It would not be expedient to disturb the order now. But he was not satisfied, either with the mode in which it was obtained, or with the circumstances under which it was granted.

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 —  
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Solicitors: *Holme, Loftus, & Young*; and *Thomas Parker*.

## IN RE COLE.

Before MR. COMMISSIONER FONBLANQUE.

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May 22.

IN this case a witness residing in the country had been summoned to be examined touching some property claimed by him, but believed to belong to the bankrupt's estate. (a) After being examined he refused to relinquish his claim to the property, proceedings being now pending in another Court relative to the same. The object of the examination was not stated in the summons.

*Semble*, that where a person, supposed to have property belonging to the bankrupt in his possession, is summoned to be examined touching such property, the object for which he is to be examined ought to appear on the face of the summons.

*Sudlow*, Solicitor, for the witness, now asked for the expenses to which his client had been put in coming from the country to attend this Court.

*Murray*, Solicitor, *contra*, contended that the witness being examined as a party claiming to retain property as against the assignees, and not simply as a witness, was not entitled to any such expenses.

The costs of a witness summoned as above must abide the result of any proceedings relative to the property in question.

*Sudlow* said that the object of the examination ought to have appeared on the summons.

MR. COMMISSIONER FONBLANQUE. The costs of the summons must abide the result of the proceedings relating to the property which are now pending elsewhere. It would be more convenient if, whenever a party was summoned to be examined relative to property supposed to belong to the bankrupt, the object for which he was examined should appear on the summons; as in that case, if the witness is not entitled to a tender of his expenses, and if he did not tender himself to be examined, the Court would, on the return of the summons, have no hesitation in issuing a warrant to compel his attendance; if it does not appear on the face of the summons whether the witness is to be examined as a party having interests hostile

*Judgment.*

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to those of the assignees, or merely as a person capable of giving information, and expenses have not been tendered, the Court will hesitate in issuing a warrant, unless special cause be shown.

Solicitors: *Sudlow & Torr*; and *Murray & Co.*

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BANKRUPTCY.  
May 29.

Ship and insurance brokers and emigration agents traded without capital, by purchasing ships and mortgaging them to the vendors and others, in expectation of being able to pay for them out of the profits of the voyages, and continued to do so after they had dishonoured bills of exchange.

They also received passage money from emigrants, but were unable to dispatch the ships for want of stores and provisions. Certificate suspended for three years, six months to be without protection; the certificate to be of the third class.

## IN RE GRIFFITHS AND NEWCOMBE.

Before MR. COMMISSIONER FONBLANQUE.

IN this case the balance sheet commenced on the 14th of February 1853, and extended to the 21st of August in the present year. It contained the following items:—

Dr. To sundry creditors	-	-	-	-	£27,010	7	10
Ditto holding securities	-	-	-	-	11,045	3	3
					<u>£38,045</u>	<u>11</u>	<u>1</u>
Cr. By sundry debtors	-	-	-	-	£1,768	15	1
Doubtful	-	-	-	-	100	1	8
					<u>£1,868</u>	<u>16</u>	<u>9</u>
Property given up	-	-	-	-	5,377	10	0
Ditto held by creditors	-	-	-	-	19,500	0	0
House and personal expenses	-	-	-	-	1,330	11	11
Losses	-	-	-	-	9,908	5	6
Cash given up	-	-	-	-	60	6	11
					<u>£38,045</u>	<u>11</u>	<u>1</u>

Of the good and doubtful debts, only 11*l.* had been recovered by the assignees. Of the property given up, 5000*l.* was the value of the ship "*Jane Green*," for the purchase of which the bankrupts had only paid 300*l.*, and the vendor had brought his action against the assignees for the residue of the purchase money.

The bankrupt, Ebenezer K. Griffiths, examined by Mr. *Lawrance* (Solicitor for the assignees), stated as follows: "The firm began business without other capital than what we could obtain from our friends. In 1854 we bought the ship, "*Daylesford*," and fitted her out at a cost of 10,000*l.*; she was mortgaged to the vendor for 5000*l.* to cover bills for the purchase money; all the bills but the one for 2000*l.* were paid. 1000*l.* was paid on signing the contract, part of which was borrowed. Taking into account the freight which might be earned, we were solvent (as I consider) when we bought the

"Daylesford." We incurred an expense of 4700*l.* on the "Daylesford," a large portion of which is still due. On three vessels which had sailed previously, we lost 5700*l.*, but we did not know that then. We are compelled by Act of Parliament to victual the vessels for twenty weeks, but we calculated on surplus stores, when the voyages might be performed by fast-sailing ships in eighty or ninety days. A loss would appear on the accounts of each of the ships on leaving London. The outfit of the "Daylesford" is still unpaid for; but it is customary to give from six to twelve months' credit on such accounts: we did, in fact, receive ready money, and take long credit. I believe that the "Daylesford" has been sold by the mortgagee for 2100*l.*, making a loss of 8800*l.* We bought her cheaply. The "Historia" cost us 7200*l.*, which has not been wholly paid; we mortgaged her for 2730*l.* The "John Barrow" cost 5050*l.*, has been offered for sale, but no second bidding was made for her. The bad state of the market caused these losses. The "Jane Green" was bought in May 1854, for 5800*l.*, of which we paid 300*l.* and some incidental expenses; fitting her out cost 800*l.* or 900*l.*, in June or July. The bankruptcy was in August. The "John Barrow" was mortgaged on the 16th of August for 3300*l.*, 500*l.* for money advanced, and the mortgagee paying a prior charge on the ship for 1250*l.*; the remainder of the mortgage money was for work previously done on our vessels; at that time we expected a profit from the "Jane Green" in case she could be despatched. We had received 2500*l.* from passengers, and there would be about 600*l.* or 700*l.* to be received by us at the time of our bankruptcy. If we could have despatched the "Jane Green," our position would have been improved, and the ship would have become the property of our creditors. We dishonoured a bill on the 22nd of May; it was for 600*l.*; about 350*l.* of that has been paid. A bill for 337*l.* was dishonoured on the 27th of July, and one for 665*l.* on the 30th; the last was given on the understanding that it should be retired. Between the 22nd of May and the bankruptcy, we purchased stores for ships to the amount of about 200*l.* or 300*l.*; about 1000*l.* worth has been paid for. Since the 22nd of May a Mr. Tennant solicited our custom, and we gave him an order, and we incurred a debt to him of 400*l.* or 500*l.* We did not tell him we were insolvent; we were to have twelve months' credit. We agreed to purchase the "Jane Green" on the 27th of May; we were then in expectation of remittances from Australia of about 1600*l.* on account of the "John Barrow;" at that time we had incurred

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a gross loss of 3237*l.* on our adventures, as well as trade expenses to the amount of 1943*l.*, and 1200*l.* had been drawn by the partners. We chartered the "Oudekirk" on the 22nd of April, but the charter-party was cancelled in July, on account of the difficulty of procuring emigrants. Proceedings taken against us at the Mansion House in respect of the delay in sailing, by another vessel, had injured our credit. The delay was through our inability to get stores on board. We lost 1700*l.* by the "Oudekirk." We afterwards bought the "Jane Green." We began to receive money from emigrants in June or July, and continued to do so till the bankruptcy. The custom is for one half the passage money to be paid when the berth is taken, and the remainder when the vessel is ready, which is announced to passengers by circulars. I think about 170 of the "Jane Green's" passengers came to London, paid their passage money, and went on board. We received from them in all 3800*l.* The stores, according to the Government scale, would cost about 500*l.*, but we would give 900*l.* We could not obtain passengers at the Government scale. No part of the money was expended in victualling the ship. On the 12th of August, we mortgaged the "Historia" to prevent the sale of other ships at a loss; we received nothing on that mortgage. When the bill of the 27th of July was coming due, I asked for time, stating that we expected remittances. I did not say I was solvent, though I was sure that the bill would be met if we could have the accommodation I asked for. We had been proceeded against in the Court of Bankruptcy by one or two parties at that time."

Cross-examined by Mr. *Linklater* (Solicitor for the bankrupts). "Before I went into business, I was book-keeper and managing clerk to a mercantile house for six or seven years. My brother (a partner) had been to Australia. I commenced business alone, as a ship and insurance broker. It is a business that requires scarcely any capital. I had assistance from my friends. My mother is a creditor for 600*l.* In four or five months Mr. Newcombe joined me; he had been connected with the "temperance movement," and had a large connection in the Northern and Midland districts. We commenced a "temperance" line of packets, and had considerable success. Our first step was to purchase the "John Barrow." We paid the whole of the purchase money out of our receipts from emigrants before the vessel sailed. The result of this first venture was a profit of 1200*l.* or 1300*l.* We chartered other vessels in 1853, but we found it more profitable to buy. We had the bulk of the emigrant trade from London. My brother joined me in 1854;



he had great knowledge of the colonies, and undertook the management of the house at Liverpool. We made a profit of 3000*l.* and upwards by the "Daylesford." On the "Historia" we made a profit of 2100*l.* We also had losses, but these were exceeded by our profits by about 1200*l.* or 1300*l.* The delay in the sailing of the "Australia" was caused by her not arriving in London in time. In July we contracted for stores for the "Jane Green;" there was a regular written contract, with a penalty of 50*l.* a day for nonperformance; the contractors offered to victual the ship at from 15*s.* to 20*s.* a head. We continued to receive payments from emigrants up to the 16th of August. We expected then to sail the vessel; she was in the London Docks, a master had been appointed, and several of the crew were on board. Nothing was wanted but the stores. We were in treaty for them up to the last moment, in expectation of being able to give the security required by the contractors. After the 16th of August, we directed our clerks to refuse to receive payments from emigrants. The "Daylesford" was sold at sea. We expected a net profit on the "John Barrow," but the master took her on an intermediate voyage, which prevented her from returning to London in time. The passengers by the "Jane Green" were maintained by our house."

The other bankrupts concurred in the evidence of Ebenezer K. Griffiths.

THE COURT took time to consider.

MR. COMMISSIONER FONBLANQUE. The awarding of the certificate is always a very anxious, and very often an exceedingly painful duty; and it is not the less so when the peculiar nature of the trading deprives the Court of what may be called the standards and landmarks by which its decisions may be regulated. The trading in the present case was of that nature; it was not an ordinary trade of buying and selling; it was a trade which has only existed in this country comparatively of late years. When emigration became very frequent a class of persons arose who made it their business either to charter or purchase ships for the conveyance of emigrants. Great abuses certainly arose in that business; and when the longer voyages to Australia became prevalent, those abuses became more prevalent also. Independent of its being a peculiar class of business, it had to deal with a peculiar class of persons—a class of persons particularly entitled to protection, because they were always the poor, and generally the comparatively ignorant. I

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*Judgment.*

have, however, endeavoured, as much as possible, to divest my mind of the feeling which compassion for the parties injured must necessarily occasion — a feeling not by any means peculiar to myself, but one very generally felt, and manifesting itself in a manner highly creditable to the benevolence of the public. The bankrupts in this case are three persons — the two brothers Griffiths, and Newcombe. Of these Ebenezer Griffiths appears to have commenced the business. He had been previously in a business somewhat analogous, — that of a ship agent and broker and insurance broker; and, as he states, his former employers induced him to start upon his own account. He started without capital — that is to say, without any real capital, and with no nominal capital except that which he could derive from the assistance of friends. Now, I would not be understood to say that no man should start in business without a capital, because it is very notorious that many men have started in business without capital, and they have realised large fortunes, much to their own credit, and even to the benefit of society. There have been men who have made an honourable independence with no better foundation than a pocket-book and a pencil; and if they have added an office at 10<sup>l</sup>. a year, so much the better. I do not say, therefore, in the first instance, broadly, that it is an offence against mercantile morality that a man should start without capital, but I say that the question of capital should always be determined by the question of the risk to be incurred; so that no man should speculate largely upon considerable uncertainties where he has nothing to fall back upon, — where he has everything to gain and his creditors have everything to lose. The mere ship-broking and insurance business did not require capital; and if Ebenezer Griffiths had continued in that business, the probability is he might have been a prosperous man, and have been saved from the position in which he now stands. After a short time, however, it appears that, being acquainted, or making acquaintance, with the bankrupt Newcombe, they joined in a new business. It is said that the bankrupt Newcombe was largely connected with the temperance movement, and that that made the opening for establishing what was called a “Temperance Line of Packets.” Don’t let me be understood for a single moment to undervalue that movement. I rejoice, and I applaud that class of persons, from whom it could be least expected, who gave a preference to the ships that were to sail under the regulations of that movement. But there are other intemperances besides the intemperance in ardent spirits. There is the intemperance of speculation, quite as intoxicating, and, as respects mercantile interests, much more dangerous;

and to that intemperance these bankrupts seem to have yielded to a very large extent indeed. With no capital, they immediately began to purchase ships — to purchase ships upon the risk of being able to pay for them with the passengers' money. With the exception of a loan from the mother of the bankrupts Griffiths, it does not appear that there was a shilling to be laid out for these necessarily heavy purchases. Ships were to be purchased — ships were to be repaired; there was no fund for the purpose; there was no money for the repairs. What was the necessary consequence? Debt and mortgage. The same evil that we see in other classes that speculate on chances prevailed here. A ship was purchased, it was repaired, and was mortgaged, and then, out of the proceeds, another ship was purchased, repaired, and, in turn, mortgaged. Although, in the statement of one of the bankrupts there is an attempt to show that there were profits upon the purchased ships, which, set against the losses upon the chartered ships, left a residue, I have not been able to discover that that was real profit; because, to make it real profit the ships should all have been paid for. And it is quite notorious that this was not the case, for in one disastrous instance, a ship (the "Daylesford") which cost somewhere about 10,000*l.* has been sold for a shade above 2000*l.* It has been said that this was under disastrous circumstances; but they were circumstances that the bankrupts ought to have foreseen. They might very well know that mortgagees would not allow their money to remain for ever; that ships at sea were sold at a loss; and they therefore ought to have anticipated that if they were not prepared to meet the bills they had given for their purchases, the mortgagees would foreclose, and they would lose their ships at an enormous sacrifice. The consequences of this course of trade developed themselves earlier than usual, for there were very quickly indications of insolvency. The first indication of insolvency was the dishonour of bills. Bills were dishonoured as early as April and May of last year. Now, without saying that a man is to stop his business the instant that he has dishonoured a bill, I have no hesitation in propounding broadly, that the instant a man has dishonoured a bill it is incumbent upon him to look into the state of his affairs, and from that time to deal prudently, cautiously, economically with his estate. But the warning seems to have been totally overlooked by these bankrupts; for though they dishonoured bills in April and May, in May they bought that vessel, upon the fate and history of which the demerits of this bankruptcy principally turn. They bought the "Jane Green" in May 1854, for 5800*l.*, of which they could only pay 300*l.* in cash. But

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*Judgment.*

they had another previous warning beside the dishonour of their bills. They had been obliged to cancel, at a great loss, the charter-party of a vessel called the "Oudekirk," for which they were unable to procure a sufficient cargo of emigrants, on account of the previous difficulty as to the "Australia."

Now, the "Jane Green" was to have sailed, according to the first announcement, on the 30th of June; and I do not find that any step was taken to victual that ship until the 26th of July, when M'Carthy and Company, of Liverpool, executed an agreement for that purpose with the bankrupts. And it is said that this was not upon any application by the bankrupts, who ought from May, or at any rate from the receipt of the first passage money, to have been diligently applying themselves to the procuring of these stores; but it is said that M'Carthy and Company made the application to victual from Liverpool, which, it was alleged, was cheaper for that purpose than London. I suspect there was delusion there, for it afterwards turned out that M'Carthy was not to supply from Liverpool; he sent up his clerk, Kelly, to supply the ship in London. And it has not escaped attention, that the agreement of M'Carthy, which, according to the evidence of the bankrupts, was a volunteered agreement on his part, is written upon paper which bears the engraved heading of the house of Griffiths, Newcombe, and Company. M'Carthy, however, had engaged to find the stores; and he subjected himself to a penalty of 50*l.* a day for not doing so. How, in the face of that agreement, he was enabled to cancel his engagement I have not been informed; and supposing the agreement to have been really a *bond fide* agreement, and not a delusion, it is difficult to understand why the bankrupts did not insist upon the penalty of 50*l.* a day. Because, though M'Carthy might have found their credit to be bad on coming to London, he had contracted, credit good or credit bad, for a certain mode of payment, and to that he ought to have been bound. But I use this more particularly to show how desperately bad the credit of Griffiths, Newcombe, and Company must have been, they being nominal shipowners, when they could not obtain credit, where credit is so easy — so dangerously easy — as in this city, for 900*l.* worth of stores, and that more especially as they had still money to receive from the emigrants, and, as they said, they expected money from the ship called the "John Barrow." I am perfectly assured that if these had been men in anything like reasonable credit they would have found no difficulty whatever either in obtaining stores on credit, or in obtaining money. They might have had to pay dear for their money, but it is exactly one of those cases of

emergency in which a man is justified in paying dearly for money; it is one of those pinches in which money at almost any but an exorbitant rate would be cheaply purchased. But that is not all. They had received the very large sum of 3800*l.* from this poor class of emigrants, who scraped all that they could scrape together — all that their means, all that their credit, all that the sale of their articles of property would enable them to collect, in order to pay for their passage; but not one single shilling of that money — which I cannot but conceive, in point of commercial morality, ought to have been considered pledged to the maintenance of the emigrants — was ever applied in the purchase of a single ounce of biscuit. There was not a pound of provision on board the ship, nor was there a pound of money at the bank of the bankrupts. Over and above that, there were claims to the amount of above 1000*l.*, without payment of which the “Jane Green” could not have left the docks. It is, therefore, the most utter delusion for the bankrupts to say that they were in hopes to the last that they should be able to sail the “Jane Green.” All reasonable minds must have seen that it was impossible. But though the sailing of the “Jane Green” was impossible — though the bankrupts had had the serious warning of their bills being dishonoured as far back as April and May, some of those bills remaining dishonoured to the present day — they mortgaged their two ships without receiving at the time one shilling of consideration. Now, if there was to be a mortgage of the ships, would not the legitimate course of mortgage have been to raise money to victual this ship, to the sailing of which they were so seriously pledged? On every point, therefore, to which I have adverted, the bankrupts have been most exceedingly faulty, almost criminal; and there is only to set against that, that their business has been conducted, in point of book-keeping, with apparent regularity. They have largely injured their ordinary trade creditors; and they have incurred an amount of trade debt which alone would have been considered enormous. But what is much worse, they incur debts to the injury of a peculiar class, who are entitled pre-eminently to protection — to that protection which has been given them, at least has been attempted by the Legislature, I fear delusively, as a very recent example will show. The Legislature gave a peculiar remedy to emigrants whose money might have been received, and whose passage was not provided. That remedy was, not only that the money, or a money penalty, should be recovered, but that the penalty should be enforced by imprisonment. So that it is evident that, in some degree, the Legislature considered that the act of an emigration shipowner who

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*Judgment.*

made default was a criminal offence. One of the bankrupts was brought under that statute; but then the exceedingly indulgent Legislation, which has given so much latitude to bankrupts for the supposed interest of estates and creditors, stepped in, and the bankrupt was released from the imprisonment which I think he had very justly incurred. All these things considered, I cannot but come to the conclusion that the trading was reckless and improvident, and that the peculiar dealing with the emigrants was fraudulent. I had some doubt whether it would not be my duty—a painful one—to refuse this certificate altogether. But the bankrupts are young men, and it is possible, and I hope probable, that the example which they have made of themselves, the disaster which has followed upon their misconduct, and the time for reflection which a long suspension will give to them, may enable them at a distant period to return to commercial society with a prospect of retrieving their characters. I shall not, therefore, refuse the certificate altogether, but I shall do that which is next to it. I shall make the certificate of the lowest class; I shall give to the certificate the longest suspension that I ever do give; and as counterbalancing the escape of the bankrupts from the penalties which the law imposed upon them by the Emigration Statutes, I shall make that suspension for six months without protection. The judgment, therefore, is, that the certificates of the bankrupts shall be suspended for three years; that, when granted, they shall be of the third class; and that for six months they shall be without protection.

Solicitors: *Lawrance*, for the assignees; and *Linklater*, for the bankrupts.

## EX PARTE ASHLEY. IN RE ROBERT DANIELL.

COURT OF  
 BANKRUPTCY.

Before MR. COMMISSIONER HOLROYD.

June 5.  
 Chattels transferred by bill of sale, but in the possession of the bankrupt at the time of the bankruptcy, pass to the assignees, notwithstanding that the bill of sale was duly registered under the Act 17 & 18 Vict. c. 36.

THE facts and arguments, as far as they are material, are set out in the judgment.

MR. COMMISSIONER HOLROYD. This was a petition of Wm. Ashley, praying the Court for a declaration in his favour, as to the right to certain goods and chattels claimed by him under a bill of sale from the bankrupt, which was given by way

that the bill of sale was duly registered under the Act 17 & 18 Vict. c. 36.

of security for 330*l.*, money lent to the bankrupt by Ashley, a copy of such bill of sale having been duly filed in pursuance of the Act of last session (*a*), intituled “An Act for preventing Frauds upon Creditors by secret Bills of Sale of personal Chattels.” The goods in question were taken and retained on behalf of the assignees of the bankrupt, as having been, by the consent and permission of the true owner, in the possession, order, or disposition of the bankrupt at the time he became bankrupt, and whereof he was reputed owner, and the question raised turns upon the reputed ownership.

It was contended that since the Act for the registration of bills of sale, no visible ownership in goods and chattels assigned by a bill of sale, of which a copy was duly filed, could give a right to the assignees of a bankrupt, under the Bankrupt Law Consolidation Act (*b*), and that the filing of a copy of the bill of sale with the power of search given by the Act took the goods out of the reputed ownership of the bankrupt.

I have looked to the Act, and it appears to me to be clear that the Bankrupt Law Consolidation Act is not affected in this respect by the provisions of the Act for the registration of bills of sale. It is obvious, from the words of the preamble, that that Act was intended for the *further* protection of creditors,—“to prevent frauds by secret bills of sale.” With that view it requires an act to be done in order to complete a title in certain cases under a bill of sale of personal chattels; but it does not make a title good which would have been bad before. As was laid down by the Courts with regard to the former Ship Registration Acts (*c*), in *Robinson v. M<sup>c</sup>Donell* (*d*), *Kirkley v. Hodgson* (*e*), and *Monkhouse v. Hay* (*g*), certain forms are made necessary to the validity of transfers which antecedently would have been good and valid without them; but it was never intended by the Legislature that a compliance with those forms should give validity to a transfer which antecedently would have been bad and invalid.

It is true that the Act for the registration of bills of sale contains provisions for enabling persons to search the registers, but this cannot be done without the payment of a fee, and I think persons are not bound to have recourse to a search; besides, the bill of sale might have been satisfied, (although satisfaction be not indorsed on the copy) and the circumstance of the bankrupt having remained in possession might have induced others to

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(*a*) 17 & 18 Vict. c. 36.

(*b*) 12 & 13 Vict. c. 106. s. 125.

(*c*) 17 & 18 Vict. c. 104.

(*d*) 5 M. & S. 228.

(*e*) 1 B. & C. 588.

(*g*) 2 Brod. & Bing. 120.

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*Judgment.*

believe that such was the fact. If, however, the Legislature had intended that the registration of bills of sale should restrain the operation of the Bankrupt Law as to reputed ownership, it would have expressed its intention clearly, as it has done with regard to transfers of ships, both in the proviso to the Bankrupt Law Consolidation Act (a) and in the Merchant Shipping Act. (b) I shall therefore dismiss the petition.

*Bagley*, counsel for assignees.

Petition dismissed.

Solicitors: *Emmet & Son*; and *J. Beattie*.

(a) Sect. 125.

(b) Sect. 72.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

March 28.

May 2.

Where an insolvent, who has obtained his final order, contracts fresh debts,

*Held*, that he cannot afterwards file a second petition, under the Protection Statutes.

*Argument.*

## RE JAMES SHAW. RE FRANCIS ROBERT LEAVER.

Before MR. COMMISSIONER MURPHY.

IN each of these cases the insolvent had obtained a final order, and, having contracted fresh debts, had obtained leave to file a second petition under the Protection Statutes. It was arranged that the validity of such petitions should be discussed upon the occasion of the first examination; and this being the day appointed for the first examination, the question was argued by *Lucas*, on behalf of Shaw. The objection to second petitions, as declared in *Re Hance* (a), was that, as the law in protection cases was to be construed by analogy to the Law of Bankruptcy, a final order placed a petitioner in the same condition as an uncertificated bankrupt; and all future property being vested in the prior assignee, the second petition was invalid, there being nothing for it to act upon. That doctrine was supported by *Young v. Rushworth* (b), where, in an action for money lent, it was held to be a good plea under 6 Geo. 4. c. 16. s. 127., that the plaintiff became a bankrupt and obtained his certificate, and that, subsequently, a second commission issued against him, under which he obtained his certificate, but did not pay 15s. in the pound, whereby and by force of the statute the debt demanded in the declaration became vested in the assignees. That case also decided that where the estate of a bankrupt, after his certificate, vested in the assignees, he could not sue for an after accruing debt, although the assignees did not interpose. In 1844 the question was again discussed, and the former decision

(a) 1 *Insolv. Cases*, 120.

(b) 8 *Ad. & E.* 470.



upheld in *Herbert v. Sayer* (a), but the judgment was reversed by the Court of Error (b), and *Tindal* C. J. said: "The point to be considered and decided is of great importance: it relates to the right of a bankrupt, twice certificated, and who has not paid 15*s.* in the pound, to after-acquired property, such as the bill for which he sues; and the question is whether he has a good right to such property against the parties to the bill and all the world except the assignees, or no right whatever, so that he could not sue at all upon the bill. We are of opinion that he has a good right, except as against the assignees, and, as the plea does not state that they have interfered, it does not contain a complete defence. And to this conclusion we have come, as well upon the authorities, as upon the reason and convenience of the principle which they establish." And, at a later part of the judgment his Lordship said: "On the argument of this case before us it was suggested that *Young v. Rushworth* was distinguishable, because it was not averred in the plea that the money sought to be recovered was after-acquired property, and also that the plea was, *prima facie*, an answer, and that, if the assignees had permitted the bankrupt to act on their behalf, such fact ought to have been replied, and that the case may be supposed to be decided upon one or both of these grounds. Upon consideration we think that it cannot be supported upon either, but that not only the weight of authority, but reason and convenience are in favour of the right of the bankrupt to sue." That decision was a strong authority in favour of the petitioner. In *Butler v. Hobson* (c) the question of the validity of a third fiat, where the second had not paid 15*s.* in the pound was carefully considered in discussing a matter of costs; and *Tindal* C. J., in delivering judgment, said: "The Court, upon a former occasion, decided that the assignees under the second commission were to be considered as the true owners of the goods, who had suffered the bankrupt to retain possession as reputed owner. Whether the right vested in the assignee under the Insolvent Debtors Court, or in the assignee under the third fiat, it was not thought material, with respect to the question then before the Court, to determine; but it has now become necessary to say whether any title to the goods can be supported by the assignees under the third fiat against the title of the assignees under the second commission; and upon this point our opinion is, that the third fiat is not a nullity, as has been contended at the bar, but that the assignees under the second commission, who have allowed the bankrupt to retain possession

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*Argument.*

(a) 5 Q. B. 965.

(b) *Ibid.* 974.

(c) 5 Scott, 831.

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*Argument.*

of the goods, as reputed owner in contravention of the Bankrupt Laws, are not in a condition to dispute the title of the assignee under the subsequent fiat to seize and administer them. In 1853, the question was again considered, in *Re Parkes* (a), and the Court held that a second petition against an uncertificated bankrupt was not absolutely void, and that where an uncertificated bankrupt had been suffered to trade without interruption or claim on the part of the assignees under the first bankruptcy, they were not entitled to any after-acquired property in the bankrupt's possession at the time of the second bankruptcy, as against the assignees under that bankruptcy; and Mr. Commissioner *Holroyd* said: "Since the cases of *Butler v. Hobson* and *Herbert v. Sayer*, a second petition for adjudication against an uncertificated bankrupt is not absolutely void. There may be property upon which it may operate; after-acquired property may be suffered to remain in the possession of an uncertificated bankrupt, as reputed owner, and in such case such property would pass to the assignees under the second petition." The law was analogous with respect to protection insolvency, and if the assignees permitted an insolvent to trade without interference, the property thus acquired became his by reputed ownership, and a second petition might act upon it.

*Cur. adv. vult.*

*Judgment.*  
*May 2.*

MR. COMMISSIONER MURPHY said the inclination of his mind favoured the sustaining of second petitions; but, as the *Chief Commissioner* entertained a strong opinion the other way, and, as the practice of Mr. Commissioner *Phillips* had been conformable to that of the *Chief Commissioner*, he should defer to their opinions, and the rule of Court would be, therefore, as hitherto. At the same time the Commissioners invited any proceeding to compel them to reconsider the subject, if wrong.

Petitions dismissed.

Attorneys: *Jennings*; and *Nicholls & Clerk*.

(a) 1 Bank. & Insolv. Rep. 113.

## EX PARTE TINDALL. RE TINDALL.

**T**HIS was an appeal, the object of which was to annul an adjudication in bankruptcy against the petitioner, on the ground that no act of bankruptcy had been committed.

The alleged act of bankruptcy was that the petitioner had not come before the Court at the time appointed in a summons issued under section 78. of the Bankrupt Law Consolidation Act, 1849. The ground on which the adjudication was impeached was, that there had been no such personal service of the summons as is required by section 80. Service had been effected by showing to Mr. Tindall the original of the summons, and leaving with him a copy of it, in which the signature of the Commissioner was omitted.

*Bacon* and *Lucas* (of the Common Law bar) in support of the application, said, that to constitute personal service of the summons the original ought to have been left, which had not been done.

Considerable discussion then took place as to the practice adopted in cases of personal service, both in Chancery and in Bankruptcy, and several of the solicitors present stated, in answer to a question by the Court, that the course they usually followed in Bankruptcy, was to obtain two originals, one of which they left with the party served.

Their Lordships, however, held, that although it might be very proper, when convenient, to adopt such a course, it would be creating a new practice to hold it necessary that an original should be left; — *The Lord Justice Turner* referring to section 121. of the Act, as indicating what was meant by the words “personal service.”

Counsel for the application then urged that no copy of the summons in this case had in fact been left, for in the document purporting to be a copy the signature of the Commissioner was omitted.

*Swanston* and *Raymond* (of the Common Law bar), in support of the adjudication, urged that justice was not to be eluded by a trick of this kind, that the signature of the Commissioner, though essential to the original summons, was quite immaterial to the copy, and that the Court would not attend to such an objection if it was in reference to the service of an order in Chancery. They also insisted that the party here had waived his right to object, by not attending and raising the

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JUSTICES.

July 28.

In serving a summons issued under sect. 78. of the Bankrupt Law Consolidation Act, it is not necessary to leave with the person served an original of the summons, but it is sufficient to show him the original, and leave with him a true copy.

If the copy so left does not contain the signature of the Commissioner it is not a true copy, and the service is irregular.

*Statement.*

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point before the Commissioner: *Rule 80. in Bankruptcy (a), Anon. (b)* [*Hasker v. Jarman (c)* was also referred to.]

THE LORD JUSTICE KNIGHT BRUCE. The question here is whether there has been personal service of the summons. I apprehend the term "personal service" in the section in question means — showing the original summons, and delivering or leaving with the person served a copy of it; this meaning of the term being settled by practice not to be departed from. Part of this ceremony or form was gone through, the original was shown, but instead of a copy being left a document was left, which, agreeing with the original in most particulars, differed from it in what I believe to be a material respect — the signature of the Commissioner was omitted. Without the signature the original would not have been a summons, and the document left was therefore a copy of something which was not a summons. The question is whether the petitioner is to be held to have committed an act of bankruptcy, an act drawing with it such serious consequences. He cannot be held to have committed it unless there was personal service of the summons, and I must say there has not been that personal service.

THE LORD JUSTICE TURNER concurred, observing that on one point suggested by Mr. *Swanston*, he felt no doubt that this Court, on a question of commitment depending on the service of a document, would discharge the party if the document left was not a true copy. The contention of the respondents in the present case was the more difficult to be maintained, because the Court was proceeding on a statutory jurisdiction, which required personal service, which meant producing the original and leaving a true copy. If the Court dispensed with one thing it might dispense with another. As to the waiver, the 80th rule referred to something that took place before the Commissioner, not to an omission to attend at

(a) "Any want of compliance on the part of the plaintiff with these rules and orders in the particulars of demand and notice and in the affidavit for summoning the defendant, and in the summons and service thereof, or in any or either of such matters, may be waived by the defendant, or allowed to be rectified by the Court, when it shall not, in the opinion of the Court, be matter of substance, or shall have arisen from a mere slip; but unless waived

by the defendant or rectified with the consent of the Court, if the same shall be made known to and proved to the satisfaction of the Court at the time required by the summons for the appearance of the defendant, it shall be deemed and taken to be a good objection to requiring the defendant to state whether or not he admits the demand sworn to by the plaintiff, or any part thereof."

(b) 1 Chitty, 129.

(c) Cr. & Mee. 408.

all, which was the case here. The present application must, therefore, succeed.

THE LORD JUSTICE KNIGHT BRUCE. We do not mean to say how the case would have stood if this gentleman had appeared before the Commissioner, or if the difference between the document left and the original had been only slight and unsubstantial.

Solicitors: *Norton & Son.*

1855.

EX PARTE  
TINDALL.  
RE TINDALL.

*Judgment.*

### EX PARTE TODD. RE WILLIAMSON.

THIS was an appeal by the assignees against an order of Mr. Commissioner *Jemmett*, admitting a proof by the respondent, Mr. Bottomley, against the bankrupt's estate. The claim in respect of which the proof was tendered, arose under the following circumstances:—

On the 15th of July 1854, a steam-engine on the premises of Mr. Williamson exploded, and caused some injury to the adjoining premises of Mr. Bottomley. On the 12th of February 1855, Mr. Bottomley commenced an action against Mr. Williamson for the damage. On the 2nd of April 1855, the action was tried at Liverpool, and, by consent, a verdict was taken for the plaintiff, with 1000*l.* damages, and 40*s.* costs, subject to a reference to arbitration.

On the 6th of April 1855, a petition for adjudication was filed against Mr. Williamson, under which he was, on the 7th, adjudged a bankrupt.

On the 18th of April 1855, Mr. Hindmarsh, the arbitrator, made his certificate, by which he certified the damage sustained to amount to 338*l.* 4*s.* 5*d.*, and directed the 1000*l.* mentioned in the verdict to be reduced to that sum.

On the 20th of April 1855, Mr. Bottomley signed final judgment against the bankrupt, and on the 5th of June following, the costs were taxed at 259*l.* 3*s.* The costs and damages thus amounted to 597*l.* 7*s.* 5*d.*, for which Mr. Bottomley claimed to prove, and the Commissioner allowed the proof.

*Swanston* and *B. L. Chapman*, for the appeal. There can be no proof for a demand not ascertained before the bankruptcy, though a verdict may have been recovered: *Ex parte Charles (a)*, *Buss v. Gilbert (b)* Section 178. of the Bank-

LOARDS  
JUSTICES.

July 30.

In an action for a tort a verdict was taken for the plaintiff for 1000*l.*, subject to a reference to arbitration. Five days afterwards the defendant was adjudged a bankrupt. Shortly afterwards the arbitrator made his certificate ascertaining the amount of damages, the assignees not having intervened in the proceedings. The plaintiff then signed final judgment, and applied to prove under the bankruptcy for the damages and taxed costs,—*Held*, that the proof could not be admitted.

Whether, if the action had been for a breach of contract, the proof would have been admissible, *quære*.

(a) 16 Ves. 256.; 14 East, 197.

(b) 2 M. & S. 70.

1855.

LORDS  
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TODD. RE  
WILLIAMSON.

Argument.

rupt Act does not alter the case: *Hinton v. Acraman* (a), *Re Gales*. (b) In the cases of *Warburg v. Tucker* (c), and *Young v. Winter* (d), the view of this section taken by the Courts is quite inconsistent with the idea of its applying to liabilities founded on tort. The word used in that section is "contracted," which does not properly apply to tort. Then the latter part of the section speaks of the person *with* whom the liability has been contracted having no notice of an act of bankruptcy at the time when the liability is contracted, which language is quite inapplicable to a liability founded on tort.

*Walker*, for the claimant. The two conditions imposed by section 178. that the amount must be ascertained within six months, and that there must be no notice of an act of bankruptcy, are satisfied in our case. There is no reason for holding that the section does not apply to implied contracts, and there is an implied contract in the order at *nisi prius*, as shown by *Bonner v. Charlton*. (e) [He then referred to, and commented upon *Ex parte Thornthwaite*, *Re Pickering* (g), *Hankin v. Bennett* (h), *Ex parte Firbanke*, *Re Dyson*. (i)]

A reply was not called for.

Judgment

THE LORD JUSTICE KNIGHT BRUCE. This case has been so fully and so well argued on each side, that we are prepared at once to dispose of it. The order at *nisi prius* was made in an action which, in spirit as well as in letter, substantially as well as formally, was an action to recover damages for a tort merely, as much so as if it had been an action for an assault. The bankruptcy took place before the award, which was made after the adjudication, and in the absence of, and without any participation on the part of the assignees; who perhaps could, perhaps could not, have intervened or interfered, but not one of whom did in any manner interfere, or attempt to do so. The question is whether, under section 178. of the Bankrupt Law Consolidation Act or otherwise, there can be a proof against the estate, by force or in respect of the award or order, and considering that the bankruptcy did not, as to the bankrupt himself, effect a revocation of the order or of the submission; considering that if the action had not come on for trial, nor the order at *nisi prius* been made until at a time subsequent to the adjudication there would have been no proof; and considering

(a) 2 C. B. 367.

(b) De G. 100.

(c) 25 L. T. Rep. 246.

(d) Ibid. 163,

(e) 5 East, 139.

(g) 23 L. J. 22. (Bankruptcy);

1 Bank. &amp; Insolv. Rep. 201., 254.

(h) 8 Exch. 107.

(i) 15 L. T. Rep. 504.

the particular language of section 178., I am of opinion that the proof in dispute was not properly capable of being made, and cannot stand. The case is distinguishable from *Ex parte Thornthwaite*, which was, in my opinion, rightly decided. Nor am I sure that if the action here had been an action for damages for a breach of contract, I should not have been equally for expunging the proof.

THE LORD JUSTICE TURNER. Mr. *Walker* has put his case on the only footing on which he could put it—that of implied contract, arising from the order of reference. We must, however, consider what the implied contract was. It was to pay such sum as the arbitrator should award. There is no contingency in the contract, except the contingency of the arbitrator not making an award. I cannot say that it appears to me that the Act has reference to a contingency of that description. I am of opinion that the case is not within section 178., and that the proof must be expunged.

Solicitors: *Charles Bell*; and *Sharpe, Field, & Jackson*.

1855.  
LORDS  
JUSTICES.

EX PARTE  
TODD. RE  
WILLIAMSON.

Judgment.

## RE EDWARD CHABERT.

Before MR. COMMISSIONER MURPHY.

IN August 1854 the insolvent had been arrested by the name of Edward Boutillier, upon a *capias*, at the suit of Henry Peters Noakes, for 48*l.*, and was discharged upon bail.

On the 12th of January 1855, the cause was tried as undefended, and a verdict returned for the amount claimed. On the 15th of the same month an order was obtained for the insolvent to surrender in discharge of his bail. On the 26th of January he filed his petition under the Protection Statutes, and, on the 5th of the following month, he surrendered in discharge of his bail, at Horsemonger Lane Gaol. Previously to the first hearing, an application was made to this Court to discharge the insolvent from custody, *ad interim*, under section 6. 7 & 8 Vict. c. 96., but Mr. Commissioner *Phillips* referred to section 2. of 5 & 6 Vict. c. 116., and said he had no jurisdiction to interfere. The insolvent now appeared on his last examination, op-

COURT FOR  
RELIEF  
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DEBTORS.  
April 13.

C., having been arrested on a *capias*, was discharged on bail. Subsequently the action was tried against him, and a verdict found for the plaintiff, upon which the defendant filed his petition under the Protection Statutes, and subsequently surrendered to prison in discharge of his bail.

Upon an application to this Court for his discharge *ad interim*,—*Held*, that this Court had no power to interfere.

C. afterwards obtained his final order.—*Held*, that this Court had power to order a discharge, having granted the final order.

*Held* also, by Mr. BARON ALDERSON, at chambers, that the final order protected the insolvent, and a discharge ordered.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE EDWARD  
CHABERT.

Argument.  
April 16.

posed by *Dowse* on behalf of Mr. Noakes, and, the merits of the case having been heard, a final order was granted.

*Griffiths* (with him *Reed*) applied for an order on the keeper of the prison to discharge the insolvent. [Mr. Commissioner *Phillips*. Have I any power? I fear not.] It was submitted the Court had ample power to make the order. Section 22. of 7 & 8 Vict. c. 96. enacted "that the final order shall protect the person of the petitioner from being taken or detained under any process whatever in the cases hereinafter mentioned; that is to say, from all process in respect of the several debts and sums of money due or claimed to be due at the time of filing the petition from such petitioner." That section contemplated an arrest subsequently to the date of the final order, or a detainer operating at the time of the final order. In either event the final order was to protect the petitioner. In this case the insolvent was detained under process in respect of a debt due at the time of the filing of his petition. Section 29. declared that if the petitioner was taken or detained under any process whatever for any debt or claim, in respect of which he was protected, the Commissioner was authorized to discharge, and the officer was indemnified for so doing.

Judgment.  
April 16.

MR. COMMISSIONER PHILLIPS said section 29. applied to the case of an insolvent who had received a protecting order under section 28. This was a final order. If an application was made to a Judge at chambers, he had no doubt he would order a discharge, but he thought this Court had not the power to liberate the insolvent.

*Griffiths* accordingly applied to Mr. Baron *Alderson* at chambers to grant a discharge, and *Patterson*, on behalf of Mr. Noakes, opposed the application, and contended that the final order did not apply to the case of a person who had been taken on a *capias*.

Mr. Baron *Alderson* said he was clearly of opinion that it did. It was not necessary for him to decide whether the Commissioner in Insolvency had the power to discharge, but he was quite satisfied the summons before him should be granted, and he should order a discharge to issue immediately.

Judgment.

MR. COMMISSIONER PHILLIPS said he had taken the opinion of Mr. Commissioner *Murphy* respecting the case of Chabert, and he was quite clear section 29. was applicable to the case. The Court would, therefore, order a discharge to issue. (a)

Attorney: *Maniere*.

(a) The order of this Court did not issue, as the insolvent had just been discharged by Mr. Baron *Alderson*.



## RE WILLIAM HENRY ACRET.

Before MR. COMMISSIONER MURPHY.

**T**HE insolvent, a clergyman, had petitioned under the Protection Statutes, and he now appeared on an adjournment of his first examination, supported by *Nichols*. The petition was dated the 29th of March 1855. On the 13th of April 1854 he had accepted a bill at three months for 6*l.* 6*s.*, drawn by one Robinson. The bill was directed "to the Rev. W. H. Acret, 19. Newman Street, Oxford Street." On the 4th of August 1854 a second bill for 15*l.* at three months, and similarly directed, was drawn by Robinson, and accepted by the insolvent, and, on the 28th of October 1854, a third bill for 20*l.* at three months was drawn by the same person, and accepted by the insolvent "payable at 19. Newman Street, Oxford Street," but this bill was directed to another place. The insolvent had never resided at 19. Newman Street, and it did not appear the opposing creditor had ever held any personal communication with him, until his appearance in this Court. The bills had been cashed upon the representations of Robinson, and each was dishonoured at maturity.

*Reed*, on behalf of the opposing creditor, submitted the petition must be dismissed. The insolvent, by accepting the bill, had adopted the direction, and was bound to describe himself accordingly. [Mr. Commissioner *Murphy*. The third bill is not directed to the insolvent at Newman Street; it is only made payable there. Bills are frequently made payable at banking houses, but no one supposes the acceptors to reside there. The first two bills are dated more than six months from the filing of the petition.] It was submitted, as the bills were unpaid, the insolvent had held himself out to the world as of 19. Newman Street from the moment he accepted them, or at least to the period of their maturity, and whilst they were capable of being transferred, which, with respect to the bill dated the 28th of October, would bring the description within six months of the date of the petition.

**MR. COMMISSIONER MURPHY.** I think 19. Newman Street ought to have been included in the description in the schedule, and I shall order the insolvent to amend the same and readvertise, but I think the description in the petition sufficient.

Adjourned to amend the description in the schedule, and to readvertise accordingly.

Attorneys: *M<sup>r</sup>. Duff*; *H. N. Powell*.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 9.

*A.*, a petitioner for protection, had accepted bills, which were directed to him at 19. Newman Street. He had never resided there, and the place was not mentioned in his description. One of the bills became due within six months of the date of his petition. Held, that the description in the petition was sufficient. Secondly, that the description in the schedule was defective, and the insolvent was ordered to readvertise.

Argument.

Judgment.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 15.

The petition of A., a prisoner, purported to be subscribed by him in the prison in which he was confined, and attested there by his attorney. It was proved the petition was subscribed by the insolvent before the arrest was effected, and that his attorney was not then present.—*Held*, that the Court had no jurisdiction, and the petition was dismissed.

*Argument.*

*Sargood*, for the opposing creditor, said it was clear the insolvent was not a prisoner when the petition was signed (*a*), and the evidence wholly contradicted the allegation of its being signed in the presence of Mr. Munday. The petition was altogether untrue and must be dismissed.

*Judgment.*

MR. COMMISSIONER LAW. I regret to be obliged to dismiss the petition, because, as far as I can see, there has been no dishonesty in the insolvent's dealing. It is quite plain the petition was not signed in the prison, and it is equally plain

(*a*) 1 & 2 Vict. c. 110. s. 35. enacts (*inter alia*) "that it shall be lawful for any person who shall be in actual custody within the walls of any prison . . . to apply by petition in a summary way to the said Court for Relief of Insolvent Debtors for his discharge." Rule 5. declares "that every petition in form pre-

pared by the Court shall be signed in the presence of the attorney of the prisoner or creditor petitioning, or of the keeper of the gaol in which the prisoner petitioning shall be confined, and such attorney or keeper shall attest the same accordingly."

## RE WILLIAM ABREY.

Before THE CHIEF COMMISSIONER.

THE insolvent had petitioned under 1 & 2 Vict. c. 110.

It appeared that, upon being sued by the opposing and detaining creditor, the insolvent had communicated with his attorney, a Mr. Hare, who had advised him to petition this Court. An appearance was afterwards entered to the action, but judgment was signed for want of a plea. Subsequently an intimation had been given to the opposing creditor that if he desired to arrest the insolvent, he would be found at a particular place on the 13th of April, and, accordingly, upon that day he was taken into execution. The petition was dated the 13th of April, and purported to be subscribed by the insolvent in the presence of his attorney, a Mr. Munday, and by him attested in the debtor's prison for London and Middlesex, but the insolvent swore, and his evidence was corroborated in that particular by a clerk to Mr. Hare, that the petition was prepared and signed in the office of Mr. Hare, upon the morning of the 13th of April, and before the arrest was effected, and he further stated he did not see Mr. Munday until some days afterwards, when he came to the prison respecting the schedule. Mr. Hare's clerk was unable to vouch positively for the presence of Mr. Munday when the petition was signed, and Mr. Munday, upon examination, could only allege his belief that the petition was subscribed in the prison and attested by him there.

Mr. Munday was not present when it was signed. No person pretends to swear the petition was signed at any other place than Mr. Hare's office, and no person can swear that Mr. Munday was then present. On the contrary, the insolvent positively swears he did not see Mr. Munday until some days after the 13th of April, and no one can swear that he did. I have no jurisdiction.

Petition dismissed.

Attorney: *Munday*.

1855.

RE WILLIAM  
ABBET.

*Judgment.*

## RE SAMUEL PERKINS.

Before THE CHIEF COMMISSIONER.

THE facts of this case will sufficiently appear from the judgment.

THE CHIEF COMMISSIONER. This is an application by an insolvent, discharged in 1851, that the Court would make a re-vesting order, on his paying to the assignee of his estate, being the provisional assignee, the taxed costs between party and party in a certain action brought by the insolvent against his assignee after the insolvency. I might, in a few words, refuse the application, as being prematurely made. In a case of this kind, the insolvent ought to obtain the assignee's account of the trust, and when that has undergone the usual examination, and the balance been settled, he may ask for the order, which brings the trust to a close; or he may claim, if he thinks proper, that the taxation of the account may be reviewed by the Court. Here the insolvent does not seek to know what is the state of the trust by applying to the trustee. He does, indeed, as appears by the terms of the motion, pretend to recognize one small amount, as if nothing beyond it could be claimable from him. But he knows the extent of litigation which he has been wantonly imposing on the assignee ever since the trust was created, and which, to this moment, he is persisting in. He knows there is an account to be taken, and that all provocation to expense must cease before the account can be treated as closed. But I will not so summarily dismiss the matter to-day. This case is so peculiar in the profligate wickedness which characterises the conduct of the insolvent and his friends, and in the injurious consequences of their proceedings to a meritorious public officer, that I must, as briefly as I may, refer to the course of circumstances which have been brought under my notice, both on the particular occasion of this motion

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

May 17.

In an application for a re-vesting order under 1 & 2 Vict. c. 110., where the insolvent had wantonly created legal expenses by proceedings against the assignee and otherwise,—

*Held*, that those expenses being caused to the assignee involuntarily, he was entitled to charge them against the trust estate, and that the insolvent was not entitled to a re-vesting order until the assignee's account of the same had been obtained and taxed, and the balance liquidated.

*Statement.*

1856.  
 COURT FOR  
 RELIEF  
 OF INSOLVENT  
 DEBTORS.

RE SAMUEL  
 PERKINS.

*Judgment.*

and on previous motions. The petitioner was, in fact, not an insolvent man. When he came to this Court his property was worth four times as much as would pay his debts. In fact, there was but one debt which he cared to get rid of. He had slandered his neighbour. That party sought only a recantation of or apology for the slander. This being refused, there was an action; and the insolvent's counsel made for him, in the Court of Exchequer, the apology which he might have made himself, at an earlier period, without expense. The apology being made, a verdict was taken for only 5*l.*, but the costs were 67*l.* 12*s.* 8*d.* He was in custody for a legal debt, and this Court had only to inquire into the capacity to pay it. It appeared that the insolvent Perkins did, on the day when the cause was tried, make over his freehold house, by a fraudulent deed, to his brother-in-law, Foster. This was the subject of inquiry on the hearing of the case before me. On this subject those two parties displayed here, for some hours, the most frightful perjury. We had false entries in books that were produced; other books were sworn to as being left at home. The accounts which they swore to as making consideration for the conveyance, partly being money, partly labour and materials, were wholly false. But as other vouchers were sworn to be producible, the case stood to the next day for their production. They were not produced; and the brother-in-law, Foster, did not dare to show himself again. If this had been a Court of Criminal Jurisdiction, the case would have ended then in a very strong judgment. I wished, as always, to give a man of this sort the opportunity of coming to his senses and paying his debts. I adjourned the case for a few months, with liberty for him to come before me again on any earlier day, with consent of the other party. This was on the 15th of March; the insolvent appeared again on the 11th of April. He had in the meantime paid into Court a sum which was likely to cover all his debts and expenses. This money, he said, his wife had got from her friends. Hereupon the opposition ceased, and he was discharged. It was now to be presumed that he had in some degree repented of his absurd and criminal conduct; but the case, while it affords a plain instance of the effect of personal constraint on a fraudulent mind, shows, at the same time, the impotency of all better motives. This man had got the money to procure his liberty; and we now know that he got it by sending Foster to pledge the deeds. But, while he used the money to relieve himself from prison, he clung to the vain scheme that it should not become available to pay his debts. All was done in this Court to prevent the proceedings from being costly to him. I stopped the appointment of a

creditor to be assignee, which was on the point of issuing, and limited that expense to the small fee which had been paid on bespeaking it, and the usual inquiry into the precise amount of debt and expenses was had without delay; but the insolvent's reckless conduct, goaded probably by some vile hanger-on of the law, prevented all happy results. Having acquired his liberty, he immediately served a formal notice on the officer of this Court not to pay to the creditor the money he had himself paid in for him; on a suggestion, purely false, that judgment had been entered for the damages only, not the costs. The creditor took out a summons, calling upon the insolvent and the provisional assignee to show cause why his debt should not be paid. This summons was served upon the insolvent on the 9th of May, and the very next day he brought an action against the provisional assignee to recover 99*l.* 7*s.* 8*d.*, out of the 104*l.* 7*s.* 3*d.* which he had just paid into Court, and on which he had obtained his discharge. He neither appeared to oppose the summons, nor make any application himself to this Court. If at this time, May 1851, the insolvent had asked for a revesting order, I should have said: "Withdraw your action, and pay the costs, and then I will listen to you." From that time till May 1855 he has never applied to the Court for a revesting order. In May 1852 he probably entertained the thought of it, for he got a reference to an examiner, to see how the assignee's account stood, which is a matter of course in the office, but never has he brought the subject before the Court. I may here say that the perjury and conspiracy from which such lamentable consequences have flowed, have been confessed upon oath by both the parties who were guilty of it. Foster, the brother-in-law, continued to aid Perkins in supporting the fraud, till at last it resulted in his own imprisonment. He was before me about sixteen months ago, and confessed the whole. Perkins, who, in 1851, swore to the distinct items of past transactions, making a valuable consideration of 450*l.* to 500*l.*, comes before me at this moment with the confession, in his affidavit, that "he did not, nor has ever, received, directly or indirectly, from Foster or any person, any good or valuable consideration for the conveyance; nor was it ever intended that he should; but that Foster has held the same for the sole use and benefit of him (Perkins), and subject to his direction." Now, let us see the progress of the injury which this man, with a folly equal to his baseness, has caused to the provisional assignee, whose trusteeship was of more importance to him (Perkins) than it was to any other person; and how he has wantonly created expenses in a trust which existed chiefly for his own benefit. Those expenses being caused to a trustee involuntarily, he is called

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*Judgment.*

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PERKINS.

*Judgment.*

upon and entitled to charge them against the trust estate, so far as they may be allowed on inquiry by this Court. Twice did this plaintiff bring his action against Mr. Sturgis to trial, and twice did he fail to appear in support of it. Judgment in the Court of Queen's Bench was had, as in case of a nonsuit, in Hilary Term 1852, and costs were taxed at 25*l.* 7*s.* The defendant was not found to be taken in execution; and it was Mr. Sturgis's duty to endeavour to protect himself from pecuniary loss. He had paid the creditors; and nothing has been in hand to protect himself. He was and is now the person in whom the freehold is vested, and he is entitled to the rent from the tenant who occupies. On the hearing of Foster's case, when he became insolvent, it appeared that the money which Perkins paid into Court was part of a sum of 130*l.* which Foster, the fraudulent purchaser, got on that occasion by mortgages to one Lees, a man ignorant of the frauds of these parties. This first came to Mr. Sturgis's knowledge when he found it necessary, for his own protection, to claim the rents of the freehold. Foster had received them for five or six quarters, handing them over to Perkins. Mr. Sturgis required the tenant, Appleton, to pay him in future. In May 1852 he gave such notice to Appleton. Appleton was not unwilling to pay him, but desired an indemnity. Mr. Sturgis did nothing further at that time. Foster distrained, got the rent, and paid it over to Perkins. Perkins and Foster, now seeing some disposition on the part of the assignee to stir in support of his rights, resolved to sell the property. A man named Bryant contracted to purchase; he was to pay 470*l.*, and he was within five minutes of being cheated out of this amount, when he got information of the false and fraudulent title. We learned this on the hearing of Foster, by the evidence of Mr. Barton, who was present as solicitor for Lees. The deeds having been settled and approved, the parties all met. The deeds were executed. The money was on the table; but it had not been handed over, when a letter was delivered to Mr. Bryant, warning him as to who he was dealing with. On the following quarter, Michaelmas 1852, the provisional assignee, having no fund in hand by which he could meet the costs which he had been compelled to incur as a trustee in defending himself against the *cestui que trust*, found it necessary to claim the rent in earnest, asserting his title as the only means of protection. I will here say that it has been admitted by the learned counsel who argued for Perkins, that he must now pay the costs of the action which he brought, indemnifying the assignee by paying them also as between attorney and client. But he has contended that the assignee will not be entitled to indemnity for any other proceedings which

have taken place. It appears to me that a statutable trustee is to be indemnified out of the trust estate for all that he has been driven to do in protecting himself against the illegal machinations of his *cestui que trust*. That which came into Court as costs, he was officially compelled to pay out by the orders of this Court, which he must obey. He did so, although he had notice of a new fraud which was planning against himself. The title to other trust property remained, and still remains, in him. All these insolvency trusts are subject to costs; first, for payment of creditors; secondly, for the debtor; the conduct of the trust being throughout subject to the control of this Court. When Perkins brought his action, he was on the point of becoming the sole *cestui que trust*; and in a week from that time he did become so. I will here assume that he paid all, though some doubt has been suggested on the amount of one of the small creditors. Under these circumstances, instead of asking for the restoration of title to that property which was in the trustee untouched, the insolvent enters upon a course of most unwarrantable proceedings for regaining that which had been duly applied according to law. I say that, for indemnifying himself against this aggression, the trustee is entitled to resort to all the property that is vested in him. I will now state the transactions which have occurred since the attempt to sell, when Mr. Bryant so narrowly saved his 470*l*. At Michaelmas 1852, Mr. Sturgis distrained. Foster distrained also; the goods were replevied, and Mr. Sturgis supported the action against the broker, who submitted, and paid the amount. At this time Mr. Barton advised Foster that the 24*l*. 7*s*. costs should be paid to Mr. Sturgis, when he had the impudence to answer that the property was his, and he had paid for it. The provisional assignee now received threats from an attorney on the part of Foster. Nevertheless, when a distress came again the next quarter in Foster's name, Mr. Sturgis again replevied. The cause was tried in the County Court, and he recovered against the distraining broker. These repeated proceedings were vexatious, and altogether unprofitable. A tradesman may recover a debt for bread or meat, and be something the better for it, notwithstanding costs; but success in such an action of replevin probably gave no surplus into the plaintiff's pocket. In the summer of 1852, Mr. Sturgis, who, of course, put this matter into the hands of his solicitor, had been advised to more active measures; he could not bring ejectment, as the tenant's lease was from Perkins, given just before his insolvency. So he sued Foster to recover the rents which he had received, and the title deeds which had come into his possession. Foster, that is Perkins for him, defended the action with two counsel,

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 ———  
 RE SAMUEL  
 PERKINS.  
 Judgment.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE SAMUEL  
PERKINS.

*Judgment.*

the attorney being a Mr. Atkinson. The plaintiff had a verdict on all the counts. The damages were, after discussion between the parties, taken at 60*L.*, and the costs taxed at 120*L.* 7*s.* 6*d.* The defendant's side had not dared to call a witness. In my opinion, Mr. Sturgis has in all these matters behaved with a becoming courage and firmness, and he has throughout given the fraudulent party all chance of desisting from a course injurious to themselves as well as to him. Before he litigated a seizure for rent, his title was explained to the tenant, a formal demand of the title deeds was made on Foster, and again, on the 23rd of August, he was thus written to by Mr. Sturgis's solicitor: — "We have delayed proceedings, understanding you were applying to the Court to have the insolvency put to an end. As nothing is done, we must proceed," &c. Judgment being entered up against Foster, he was taken in execution, and petitioned this Court. He was heard on the 7th of December 1853, and, as may be supposed, received an unfavourable adjudication. At last, Mr. Sturgis began to think of having the house sold, that his costs might then be paid before any balance could come into the hands of Perkins. But it was not long before Perkins himself came forward again as an actor in the matter. His brother-in-law, who had been hitherto the professing freeholder of the house, could no longer sustain that character, being himself an adjudicated insolvent. So Perkins throws off the disguise, turns his back upon Foster's title, and boldly proclaims himself the freeholder, seeking protection against the charge which existed under this Court. On the 25th of January 1854, the provisional assignee is said to have obtained the approbation of this Court (I do not remember it) to proceed to a sale. On that same day, Perkins filed a bill in Chancery to restrain him from selling, making Lees also a defendant, who lent the money to Foster. Now this was a very clumsy way of proceeding. Why did not he apply here for a revesting order? Or, if he only then wanted the sale to be restrained, and not a revesting order, this Court has the power to do that very thing under a special clause in the Improvement Act. However, we find Mr. Perkins going into Equity, and relying, as he necessarily did, on his own fraud. In 1855, for the first time, he comes here to seek his title; and on what ground? On the very ground, according to his own affidavit, that all he swore in 1851 was false; that Foster's deed was without consideration; and that he, Samuel Perkins, is still the freeholder, subject to the better, but temporary, title of the provisional assignee, which he asks me to terminate. This is his case here. He can have no better case in the Court of Equity, for Lees is brought in there as the mortgagee of



Foster. The answer which this Court gives to his application is, that when the exigences of the trust are satisfied, when the provisional assignee's account is obtained, which it will be on asking for it, and when that account has been duly taxed and the balance liquidated, there will not be five minutes' delay on my part in making a revesting order. The case is not ripe for it now; and the application is refused.

Attorneys: *Walker & Harrison*; and *Silvester*.

1855.

RE SAMUEL  
PARKINS.

*Judgment.*

### RE CHARLES WATT.

Before THE CHIEF COMMISSIONER.

THE insolvent, a baker, and a petitioner under 1 & 2 Vict. c. 110., was opposed by counsel on behalf of the detaining creditors, and by a Mr. Hollands, a miller, in person. It was admitted by Mr. Hollands that he had visited the insolvent in prison, in order to effect a settlement of his account, and that he had threatened to oppose his discharge unless the terms proposed were complied with.

*Macrae*, on behalf of the insolvent, submitted the evidence of Mr. Hollands put him out of Court. The object of the statute was the equal division of an insolvent's estate amongst the whole of his creditors, but that object would be frustrated if creditors were permitted to benefit themselves by working upon the fears of the debtor. To countenance such compromises would be holding out a premium to dishonesty, as insolvents would be induced to conceal their property, in order to buy off the complaints of troublesome creditors. These views had operated upon the minds of other Commissioners, and under circumstances similar to those proved in this case they had declined to hear the complaint of the creditor. (a)

*The Chief Commissioner.* The creditor comes here as a witness, and I have no right to refuse his evidence. If I did refuse it, a *mandamus* might issue to-morrow, and compel me to hear it.

The creditor thereupon went into his case, and it appearing that the insolvent had purchased of him upwards of 60*l.* worth of flour, at a period when he was hopelessly insolvent,

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

June 2.

H., a creditor, having visited the insolvent in prison in order to effect a settlement of his debt, and having threatened to oppose unless his terms were complied with, it was objected at the hearing that H. ought not to be permitted to oppose.

*Held*, that this Court had no right to refuse his evidence, and he having made out a case against the insolvent, the Court ordered a remand at his suit.

*Judgment.*

THE CHIEF COMMISSIONER ordered a remand at his suit, for a period of nine months from the date of the vesting order, for contracting the debt without reasonable expectation of payment.

Attorney: *Hallet*.

(a) *Re Penfold*, 1 Bank. & Insolv. Rep. 220.; *Re Batty*, 2 Ibid. 17.; *Re Broad*, Ibid. 13.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

June 6.

F., a fisherman, was the owner of twelve fishing-smacks, which he used for the purposes of that pursuit, and occasionally, when there was room to spare, he brought home the fish of other persons, and was paid for the conveyance. *Held*, that the ownership of the smacks, and the occasional conveyance of fish for a profit, did not constitute a trading within the meaning of the Bankrupt Laws as a shipowner or a carrier.

*Judgment.*

## RE THOMAS ROBERT FORGE.

Before MR. COMMISSIONER MURPHY.

IN April last the insolvent had been heard under the Protection Statutes, when his petition was dismissed in consequence of an insufficient description. He now appeared under a new petition, describing himself as a "fisherman and fishing-smack owner having a warehouse at the waterside, Barking." It appeared he was the owner of twelve fishing-smacks, which he employed on the coast of Holland in fishing for turbot. The smacks were duly registered, the average tonnage being from fifty to sixty tons. The insolvent did not go to sea himself, but he manned the smacks, paid the wages of the crews, and furnished the necessary stores. He never bought fish to complete a cargo, but occasionally, when there was room to spare, the smacks brought home the fish of other persons, which were delivered to the factors of the respective owners who sold them, and paid a fourth of the profits for the conveyance.

*Francis*, for the opposing creditor, said he should contend the insolvent was a trader, within the meaning of the Bankrupt Laws, as a carrier and shipowner.

MR. COMMISSIONER MURPHY. The points suggested have received my best consideration. When the insolvent was last before the Court he omitted to describe himself as a fisherman, and his petition was dismissed in consequence. All that could be said in favour of your proposition, was then urged by Mr. *Nichols*, who appeared on behalf of several creditors. I then intimated that had the insolvent described himself as a fisherman, I should have considered the ownership of the smacks to be ancillary to that business; and with respect to the second point, I thought the occasional conveyance of goods under the circumstances detailed did not constitute a trading as a "carrier" within the meaning of the Bankrupt Laws. The facts before me to-day are the same as they were before, and I adhere to the opinion I then formed. (a) I shall hold the ownership of the smacks to be ancillary to the business of the insolvent as a fisherman, and that the occasional conveyance of fish under the particular circumstances of the case does not bring him within the meaning of the Bankrupt Laws as a "carrier."

Objections overruled.

Attorneys: *Gole*; *Silvester*.

(a) *Re Forge*, 2 Bank. & Insolv. Rep. 98.

1855.

LORDS  
JUSTICES.

Aug. 1. 3.

## EX PARTE WALKER. RE HAYWOOD.

**THIS** was an appeal by the petitioning creditor from a decision of the Commissioner, refusing to adjudge the trader a bankrupt.

The facts were shortly these: Mr. Walker, the petitioner, served on Mr. Haywood a trader debtor summons, under section 78. of the Bankrupt Law Consolidation Act. Mr. Haywood appeared to the summons, and admitted the demand, but neither paid it nor gave security for it within seven days, so that at the expiration of seven days he was, under section 81., to be deemed to have committed an act of bankruptcy. After eighteen days Mr. Walker filed a petition for adjudication founded on this act of bankruptcy. Mr. Haywood, however, in the meantime, and before the expiration of the seven days, had presented a petition under section 211., and obtained an order for protection from process until further order. The Commissioner held that this order precluded him from adjudging Mr. Haywood a bankrupt on Mr. Walker's petition, and from this decision Mr. Walker appealed.

*Giffard* and *Romer* (of the Common Law bar) for the appellant, contended that "process" did not include proceedings in bankruptcy; and that if it did, a debtor could not, on a fair construction of the sections taken together, defeat the creditor's proceedings by a subsequent step like this. They referred to *Blackford v. Hill*. (a)

*Bacon* and *Woodroffe*, for the trader, supported the decision of the Commissioner.

**THE LORD JUSTICE KNIGHT BRUCE** said that in his opinion, according to the true construction of the Act, when a trader had signed and filed an admission of a creditor's demand under sections 79. and 81. of the Act, it was not competent to him, within the seven days limited by section 81., to take advantage of section 211. against the creditor whose demand he had admitted. The only doubt arose from the appellant's delay in applying for an adjudication; but as the point had not been called to his attention before, he must have an opportunity given him of explaining the delay.

**THE LORD JUSTICE TURNER** said that he was of the same opinion. Such a construction ought to be put on the different clauses of the statute as to make them consistent with each other. He doubted whether the word "process" applied at all

A trader who, on being served with a trader debtor summons, has appeared and admitted the debt, cannot, within the seven days limited by the 81st section of the Bankrupt Law Consolidation Act, defeat the creditor's proceedings by obtaining an order for protection from process under the arrangement clauses.

The creditor, however, must prosecute his proceedings with due diligence; and, *semble*, an unexplained delay of eighteen days from the expiration of the seven days to the filing the petition for adjudication, would be a bar to his proceeding to adjudication.

Judgment.

1855.

LORDS  
JUSTICES.EX PARTE  
WALKER.

RE HAYWOOD.

Aug. 3.

to proceedings in bankruptcy ; but if it did, it must, at all events, be taken in a restricted sense in section 81., otherwise that section would conflict with the 101st. The case might be mentioned again as to the point of delay.

The case was mentioned again, and an affidavit on behalf of the petitioner explaining the delay was read. Their Lordships, considering the explanation satisfactory, reversed the decision of the Commissioner.

Solicitors: *Bridger & Collins.*

COURT OF  
BANKRUPTCY.

June 23.

Definition of  
a scrivener  
and of a bill  
broker.

A few  
money trans-  
actions, in-  
cidental to  
some other  
business, are  
not within the  
meaning of  
the Bankrupt  
Law.

But the  
number and  
extent of  
such trans-  
actions, where  
they are car-  
ried on with  
the intention  
of gaining a  
profit in the  
regular way  
of business,  
will not affect  
the operation  
of the Bank-  
rupt Laws,  
where it is  
contended that  
such trans-  
actions were  
incidental to  
some other  
business not  
within the  
scope of the  
Bankrupt  
Laws. The  
intention in  
carrying them  
on must be gathered by their extent as compared with that of the other business, and the mode in which they were transacted.

## IN RE LANE.

LANE, who had been adjudicated a bankrupt as a bill broker and gas manufacturer, now showed cause against the adjudication, alleging that he was not a trader.

The case was heard at considerable length, but the principles of law on which his Honour founded his opinion will be found in the judgment.

*Bagley* counsel for bankrupt.

*Lucas* counsel for petitioning creditor.

MR. COMMISSIONER GOULBURN. I have been favoured with a copy of a summing-up by my Lord *Truro*, while Chief Justice of the Common Pleas, in the case of *Columbine v. Pennel*, which came before his Lordship and a special jury at the sittings at Nisi Prius at Westminster, on the 6th of February 1850. There were several issues, but those which I shall presently refer to were, in substance, whether one *Columbine*, the plaintiff, an attorney, who had been adjudicated a bankrupt, was, in point of fact, a scrivener and bill broker within the meaning of the Bankrupt Laws. The learned *Chief Justice*, referring to that part of the case, (there were many other questions not material to the case now before me) said, "I take a scrivener to mean a man who received another man's money to lay out, to gain profit or advantage—practical advantage—from the employment of those moneys ; I do not think it matters precisely in what way. A man who has a few transactions of that kind in connection with some other pursuit, and who is not in the nature of his trade a scrivener, would not be subject to the Bankruptcy Law. He

would not, by the force of two or three transactions, be drawn within the provisions of the law; not but that two or three transactions would be quite sufficient, provided they were in execution of a general intention to carry on such business, and to be so employed. If the jury is satisfied that a man who sets up in a trade has the intention to trade generally — to do as much as he can, although he may have only two or three transactions, — that will be quite enough; not by force of the two or three transactions, but by force of the evidence of general intent. If an attorney, carrying on business as an attorney, has a few transactions in the way of money connected with his business as attorney, that would not make him a scrivener; because it may be that the occupation of a scrivener, or that the transactions of a scrivener, are merely incidental to his character as an attorney. To constitute him a scrivener in such a case it must be that his attorneyship be incidental to his character of a scrivener, — the one must be the principal, and the other the incidental. At present we have no evidence of the extent of this gentleman's (a) business as an attorney; you know much more about his business in money transactions than you do of his professional business as an attorney. To what extent the latter was carried on, independently of these money transactions, or to what extent his money transactions were mixed up with his other business by the circumstance of his being an attorney, we do not know. If he really held himself out as a person ready to receive men's money, and to invest it with a view of gaining pecuniary profit, a person interfering in those transactions then, although he may be an attorney also, that will not prevent his being made a bankrupt; but it must be a substantial pursuing of the occupation of a scrivener, and not merely a few transactions which may be incidental to his character of an attorney, that will make him a scrivener. You observe the manner of doing so will also be material. Now there are, I think, twelve instances of regular pass-books, such as you have seen, — of the form of a banker's pass-book. That looks like a general course of business, and you have a great many notes to those persons acknowledging the receipt of money, — 'I have received so much money in order to lay out at interest for your benefit,' and so on. Well, these notes are precisely what one would expect to find in the course of business with a scrivener receiving other men's money in order to invest it. Are you to suppose he did this for nothing, or with a view of gaining profit — gaining money, — certainly a portion of the profit you have before

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COURT OF  
BANKRUPTCY.  
IN RE LANE  
*Judgment*

(a) Columbine, the bankrupt.

1855.  
COURT OF  
BANKRUPTCY.

IN RE LANE.

*Judgment.*

you; that is to say, the interest upon the receipt of the income. Those who possess the pass-books are not the persons to whom the money was advanced, and who paid the procuration money or the profit which the scrivener derives; they are persons who advanced the money — the procuration would be paid by the persons borrowing; for you know it is usual for men who borrow money to pay all expenses incident to the transaction. You must draw your own inference from such circumstances as bear upon the case, either from the extent or number of the transactions, or from the manner in which they were carried on. Whether his business was large or small in that respect is no matter, except so far as the extent may lead you to the conclusion as to its being a general pursuing of the business as a matter of trade and profit. You will look to the manner in which it was done with the view of ascertaining what was really Mr. Columbine's situation; whether he was a person receiving money and giving notice to persons that he had money to lay out at 5*l*. or 10*l*., or any other rate of interest; you will judge from that whether he was carrying on the business of a scrivener or not, or whether it was a few transactions incidental to his character of an attorney. So with regard to the bill broking; if he held himself out as a person willing to discount, and who was in the habit of receiving bills from various persons, his customers, to discount, and his business was forsooth that of a person receiving bills and discounting them himself, or procuring them to be discounted by others, he himself making a profit by those transactions, and such was the general course of his business, he may well be considered a bill broker. You will draw your inference from the manner in which he acted, and from what you learn of the transactions themselves, as in the case of a money scrivener; they are very much united in character, although a distinction obtains; it is very possible for a man to carry on both.

“Now you are told that an attorney occasionally discounts bills. A great deal was said on that subject, — rather more than happened to fall within my experience, I confess; however, you must act upon your own experience.

“Now, it stands before you that his transactions in bills amounted to 40,000*l*. in a period short of three years; you have the bill books before you which will show whether that 40,000*l*. bills was all he received, because it would not follow that because he discounted 40,000*l*. worth at the bankers, that he did not discount with some other persons; he might raise money in various ways. You will say whether you think those bills were discounted by him to the extent that an attorney usually

does — whether an attorney discounts for the purpose of getting interest upon capital, as distinguished from getting something in the nature of profit upon the discount beyond the mere interest. An attorney may, it is true, discount; but whether he discounts at one rate, and then re-discounts at another rate, a greater rate, and so actually makes a profit, instead of doing it for the purpose of interest, you will form your own opinion, and consider whether the extent of these transactions, looking at his bill book and his banking book, you will say whether he carried on the business of a bill broker; that is to say, whether he held himself out as a person desirous of receiving bills for discount, making a profit by re-discounting them, charging as much as possible, and giving as little as he could to those who discounted for him. Therefore consider, with respect to those present circumstances, whether you think he carried on the business of a scrivener, and the business of a bill broker.”

Thus I find the law laid down by the highest authority, as well as the rules by which a conclusion is to be arrived at in a case where the main question is whether a course of transactions was systematically pursued with a view to profit, or whether the transactions were such as were merely incidental to some other business, which does not come within the meaning of the operation of the Bankrupt Laws. Such is the case now before me, and its circumstances (as far as relates to the question of discounting) are very similar to those of the case in the Common Pleas. The transactions are more numerous and extensive, and the mode in which they were carried on was not such as would have been necessary had the transactions been merely secondary to something else. It has been shown that an office was kept where money dealings were discussed and transacted with all comers; that circumstance, in my mind, goes a great way to establish the fact that Mr. Lane intended to follow the business of a bill broker as his chief occupation; and, looking at all the circumstances of the case, I can come to no other conclusion than that a trading in bills within the meaning of the Bankrupt Laws was actually carried on. The adjudication must be confirmed.

HIS HONOUR was also of opinion that the evidence established the fact that Mr. Lane was a manufacturer of gas within the meaning of the Bankrupt Laws; but no question of law arose on that part of the case.

Attorneys: *Chadley*; and *Mason*.

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COURT OF  
BANKRUPTCY.  
IN RE LANE.  
*Judgment.*

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

June 13.

Where a petitioner for protection parts with property except for the necessary support of himself and his family, and the necessary expenses of his petition, or in the ordinary course of his trade, within three months of the date of his filing his petition, the petition will be dismissed.

*Argument.*

## RE EDWARD BUTTER.

Before MR. COMMISSIONER MURPHY.

ON the 2nd of May the insolvent, a builder, had filed a petition under the Protection Statutes, and he now came up on his adjourned interim order, supported by *Dowse*.

It appeared that in April last a verdict had been obtained against him by the opposing creditor, with 25*L* damages, in an action of trespass for breaking and entering the house of the plaintiffs; and, on the 10th March following, he had indorsed to the attorneys, who had conducted his defence, a bill of exchange for 40*L*, which he had received in the course of his business, in satisfaction of their claims. He had previously paid them 10*L*.

*Pearce*, for the opposing creditor, called attention to the allegations of the petition, to which the insolvent had sworn: "That your petitioner has not parted with or charged any of his property (except for the necessary support of himself and his family, and the necessary expenses of this, his petition, or in the ordinary course of his trade) at any time within three months of the date of filing his petition, or at any time, with a view to this petition." It was quite clear the payment to the attorneys did not come within either of the exceptions, and it was submitted, on the authority of *Re Thorpe* (a), the petition must be dismissed.

*Judgment.*

MR. COMMISSIONER MURPHY said it was quite apparent the allegations of the petition were untrue, and, moreover, the bill had been given to the attorneys at a period when the insolvent was hopelessly involved. He should dismiss the petition.

Petition dismissed.

Attorneys: *M<sup>c</sup>Duff*; and *Gadsden*.

(a) 1 Bank. & Insolv. Rep. 185.



## RE CHARLES JEEKS.

Before THE CHIEF COMMISSIONER.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

July 18.

ON the 13th of April 1855, judgment was given against the insolvent by the County Court at Uxbridge for 10*l.* debt, and 1*l.* 15*s.* costs in an action wherein he was the defendant, and one George Henry Heron and others were the plaintiffs. On the 14th of May following he filed a petition in this Court under the Protection Statutes, and received an interim order for protection. On the 16th of May he appeared at the County Court at Uxbridge, in obedience to a judgment summons which had been issued against him at the instance of the plaintiffs. He then exhibited his protection to the Judge, who, notwithstanding, ordered him to be committed to prison for thirty-five days. On the 12th of June he came up for his first examination in this Court, when he was opposed by the plaintiffs and other creditors, but no case being established against him, a final order was granted on the 4th of July following. On the 9th of the same month he was arrested, pursuant to the order of the Uxbridge County Court. The warrant of committal, after reciting the facts of the judgment being recovered for 10*l.* and 1*l.* 15*s.* costs, and that the defendant had been ordered to pay forthwith, proceeded: "And whereas the defendant, not having paid the said sum, pursuant to the said order, a summons was, upon the application of the plaintiffs, duly issued from and out of the said Court against the defendant, by which said summons the defendant was required to appear at the said County Court of Middlesex, at Uxbridge, on the 16th day of May 1855, to answer such questions as might be put to him touching his estate and effects, and the manner and circumstances under which he contracted the said debt, which was the subject of the action in which the said judgment was obtained against him; and as to the means and expectations he then had, and as to the property and means he still had of discharging the said debt, and as to the disposal he had made of any property. And whereas it was duly proved on oath at the last-mentioned Court that the defendant was personally served with the said summons: And whereas the defendant did not attend as required by such summons, or allege any sufficient excuse for not so attending, and thereupon it was ordered by the Judge of the said Court that the defendant should be committed for a term of thirty-five

On the 16th of May, J., being protected from process by an order of this Court, appeared at a County Court in obedience to a judgment summons, which had been issued against him at the suit of a creditor whose debt was set out in the schedule. He then exhibited his protection to the Judge, who, notwithstanding, ordered him to be committed for thirty-five days. On this order J. was subsequently arrested. The warrant set out "that he was personally served with the summons, but did not attend, whereupon he was ordered to be committed for thirty-five days." J. having moved this Court for a discharge, and denied by affidavit the truth of this statement, the Court granted a rule to show cause, and the judgment creditors presenting no facts in answer to the affidavit, the Court ordered a discharge.

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 COURT FOR  
 RELIEF  
 OF INSOLVENT  
 DEBTORS.  
 —  
 RE CHARLES  
 JEES.  
 Statement.

days to the Debtors' Prison at Whitecross Street, in the city of London, according to the statute in that case made and provided, or until he should be released by due course of Law." On the 14th of July *Reed* moved for a discharge, and the application being supported by an affidavit from the insolvent setting out the dates of the proceedings in this Court and the County Court, and distinctly alleging that he did appear in obedience to the judgment summons, and exhibited his protection, and that the statement in the warrant which recited that he did not attend was untrue, the Court granted a rule to show cause, in the following terms:—

*"In the Court for Relief of Insolvent Debtors. — In the Matter of Charles Jeeks."*

"Let George Henry Heron, George Rippon Heron, and William Charles Heron, show cause, on Wednesday next, the 18th of July, at 12 o'clock at noon, why the said Charles Jeeks, who appears to have been taken by the said warrant for a claim in respect of which he was at the date of the order protected from process by an order of this Court, and has been and still is so protected, should not be discharged out of custody as to such warrant, pursuant to the statutes. And inasmuch as it is sworn that the said Charles Jeeks did appear in pursuance of the summons at the Middlesex County Court, and did produce his order of protection, which facts do not agree with the recitals in the warrant of committal, let a copy of this rule be served on the Judge and on the clerk of the said County Court, as well as on the said creditors, and let a copy of the affidavit of the said Charles Jeeks be also served with each copy of this rule. Let the service be made by the messenger this day, and the service on the creditors and on the County Court clerk be made by post.

"WILLIAM JOHN LAW,  
*"Chief Commissioner."*

*Argument.*

*Dowse* now, on behalf of the creditors, showed cause. If the warrant issued improvidently, the County Court at Uxbridge is the proper Court to apply to for redress. If the insolvent did attend in obedience to the judgment summons, he will have no difficulty in convincing that Court of the committal being wrong. [*The Chief Commissioner.* You think he ought to go to Uxbridge to complain; suppose his thirty-five days should have expired before the sitting of that Court, what good would he do by going there?] If his time had expired he would have a right of action.

THE CHIEF COMMISSIONER. The debtor has to thank his creditors for confirming his case. That the warrant was issued improvidently is now beyond all doubt. When the insolvent, a respectable man, was before this Court, he told me he had a warrant of committal against him, but he was mistaken in the date of it. He said it was the 13th of May, and I told him if the date was correct it was prior to the protection here, and he might be taken in spite of his protection. He has been taken, and he moves to be discharged. Seeing how the warrant is drawn up, and finding by the insolvent's affidavit that he contradicted the important parts of it, I made a rule to show cause on the creditors; and, that there might be no mistake, I set out that the warrant was not correct, and invited them to deny it if they could. I also thought it right to give the Judge and the clerk of the County Court an opportunity to assist me to put the matter right; but as no facts are presented, I take it for granted the warrant is untrue, and that the insolvent's protection was disregarded. I shall issue the warrant to discharge him.

Discharged accordingly.

Attorneys: *Marshall*; and *Gardiner*.

## RE WILLIAM OWEN TUCKER.

Before THE CHIEF COMMISSIONER.

THE insolvent, who described himself as an attorney at law, had petitioned under the Protection Statutes as a non-trader. The debts amounted to 455*l.* 6*s.* 1*d.*

In May 1854, being indebted to the opposing creditor, a Mr. Warburg, in the sum of 2450*l.*, he had executed to him a bond for that sum, payable in 1861, and at the same time assigned, by way of collateral security, three policies of insurance for 1000*l.*, 1000*l.*, and 500*l.* respectively, covenanting to keep up and pay the premiums as they became due. In September 1854 the insolvent was adjudicated a bankrupt as a share broker, and obtained his certificate in February 1855. In the month of March following two premiums became due, amounting together to 66*l.* 10*s.*, and the same were paid by Mr. Warburg, who sued the insolvent to recover the amount. The

T. then petitioned this Court under the Protection Statutes as a non-trader, to pay being entered into during the trading of T., the debt arising upon the contract constituted him a trader. *Semble*, the contract

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RE CHARLES  
JEEKS.

*Judgment.*

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.  
*July 20.*

T. assigned certain life policies to W., and covenanted to pay the premiums. Shortly afterwards he was adjudicated a bankrupt, and obtained his certificate. He then ceased to trade. Subsequently two premiums became due, and were paid by W., who sued T. for the amount, and obtained judgment.

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RELIEF  
OF INSOLVENT  
DEBTORS.

RE WILLIAM  
OWEN  
TUCKER,

*Argument.*

insolvent pleaded his bankruptcy and certificate, but the plea being demurred to, judgment was given, after argument of the demurrer, in favour of the plaintiff for the amount claimed. Some negotiations afterwards took place between the plaintiff and the defendant with the view to a settlement, but no arrangement being effected, the insolvent petitioned this Court, and now came up for his first examination.

*Dowse*, for the opposing creditor, having called evidence, and proved the foregoing facts, submitted the Court had no jurisdiction. The debts were beyond 300*l.*, and the facts disclosed established a trading which brought the insolvent within the meaning of the Bankrupt Laws. The undertaking to pay was complete in 1854, when the insolvent was a trader, and the debt against which he sought protection would have reference to that time, and consequently would be a debt contracted whilst he was engaged in trade.

*Nichols*, for the insolvent, contended that as the debt did not exist until after the bankruptcy, and as the insolvent had not since been engaged in trade, the debt could not be considered as a debt contracted in trade. Suppose a trader twenty years ago covenanted to make certain payments, and five years afterwards ceased to be a trader, it could not now be said if a debt arose upon the covenant it was contracted in trade. The creditor had no claim upon the insolvent until March 1855, and the trading altogether ceased in September 1854.

*Judgment.*

THE CHIEF COMMISSIONER. When a debtor gives a promissory note, he contracts a debt, although it is not payable at once. This debt did not become payable until March 1855, but the covenant to make the payment was executed in May 1854. My impression is that the insolvent is a trader; however, if the parties desire a little time, I will delay my judgment.

The case was accordingly adjourned, and the opposing creditor and the insolvent having made a private arrangement, the petition was dismissed by consent.

Attorneys: *Lewis & Lewis*; and *Jones*.

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## RE GEORGE GREEN.

Before MR. COMMISSIONER PHILLIPS.

IN November 1854 the insolvent, who described himself as a rag merchant, had taken of the opposing creditor a house for the purpose of letting lodgings. He had never resided on the premises, but the rooms were let to different lodgers, who paid a certain sum per week for the accommodation of lodging. The opposing creditor, being unable to obtain the rent, applied for possession, which was refused, but eventually, and after the filing of the petition, the key was delivered up.

*Reed*, for the opposing creditor, submitted the petition must be dismissed. The insolvent was essentially a lodging-house keeper, but he had not so described himself. The house was taken for the express purpose of letting lodgings, and not as a residence; and although the creditor had received no rent, the insolvent had made a handsome profit of the speculation.

MR. COMMISSIONER PHILLIPS. There can be no doubt this man is a lodging-house keeper as well as a rag merchant. He occupies one house and rents another solely for the purpose of letting it out in lodgings. He has several tenants occupying the different apartments and receives rent from each. He ought to have described himself as a lodging-house keeper as well as a rag merchant. He has not done so, and the petition must be dismissed.

Attorneys: *Jay*; and *M<sup>r</sup> Milin*.

1855.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

July 21.

Where an insolvent fails to describe himself as of all the businesses he has followed during his six months' residence within the jurisdiction of the Court, the petition will be dismissed.

*Argument.**Judgment.*

## RE JOHN HUDSON.

Before THE CHIEF COMMISSIONER.

IN January 1855 the insolvent, a wine merchant, being indebted to one H. M. Marley in the sum of 250*l*. for money lent and paid on his account, executed to him a bill of sale on his furniture and effects to secure the debt. In the month of May following the security was valued by an auctioneer at 268*l*., and taken possession of by Marley in liquidation of his claim, and shortly afterwards sold by him to another person. In July the insolvent was arrested, and filed his petition under 1 & 2 Vict. c. 110., and he now appeared to be discharged on bail, according to the provisions of section 38., one of the proposed sureties being Mr. Marley.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

July 26.

Where an insolvent makes over his property to a particular creditor to secure his debt, this Court will not accept such creditor as a surety for the insolvent under sect. 38. 1 & 2 Vict. c. 110.

1855.

RE JOHN  
HUDSON.*Judgment.*

THE CHIEF COMMISSIONER. The whole of the insolvent's property having gone into the possession of Mr. Marley, I am asked to accept him as one of the sureties for the insolvent's appearance on the day of hearing. I decline to do so. My practice is to decline such sureties. If Mr. Marley will deposit with the provisional assignee the 250*l.*, the Court will accept his bail, but not otherwise.

Attorneys: *Lewis & Lewis.*

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Sept. 17.

The insolvent, in conjunction with two others, established a loan society, and, afterwards received from his partners various sums to advance to borrowers, which he appropriated to his own use. The fraud being discovered, and his partners fearing to be unable to recover outstanding loans without his assistance, an arrangement was come to by which his interest in the funds of the society was to be retained by his partners, and the sum appropriated repaid by instalments. The insolvent was afterwards employed by the society, and paid three instalments, in pursuance of the agreement. Subsequently, some new misconduct being discovered, he was discharged, and, the instalments being in arrear, arrested. Having petitioned this Court, and being opposed by his late partners on the ground of fraud,—  
*Held*, that the creditors had not waived their right to complain of the fraud by entering into the arrangement with the insolvent, and that a good debt existed upon which to rest the opposition.

## RE BENJAMIN WALTER ULPH.

IN 1850 the insolvent, in conjunction with two others, established a society for the purpose of lending out money at interest. Each of the partners advanced 150*l.* to commence the business, and the profits were to be equally divided. It was the insolvent's duty to inquire into the stability of proposed borrowers, and if his inquiries proved satisfactory, to advance the required loans, and to receive security for their repayment. It was also his duty to enter the names and addresses of the borrowers and their sureties in a book kept for that purpose, and to deposit the notes given by them with the manager. During the two years and a half that followed the establishment of the society, various sums were handed to the insolvent for the purpose of his making advances to persons whom he represented as borrowers, but it frequently happened that he omitted to make the proper entries in the book, or to deposit the borrowers' notes with the manager. If requested to do so, an excuse was offered, and the matter thus delayed from month to month. According to the rules, all loans were repayable at the offices of the society, but on many occasions the insolvent brought money to the manager, alleging its receipt from borrowers who were reluctant to appear at a loan office. Eventually, many of the repayments being in arrear, letters were written by the manager to the borrowers and their sureties, requesting a remittance, but the majority were returned by the dead letter office, the persons addressed being unknown. These facts were communicated to the insolvent, with an intimation that the offices would be closed; whereupon he replied that five hundred bills were out, and he was the only witness to the signatures, and threat-

ened to write to the borrowers and tell them not to pay. The books of the society were then inspected by the manager, and a list made out of borrowers who had given no security, and of those who were unable to be found, when it was ascertained that together they represented a sum of 732*l.* 18*s.* 10*d.* The insolvent's partners, impressed with the knowledge that loans to the amount of 3000*l.* were owing, and feeling the difficulty of recovering them without the insolvent's assistance, through whom they had been effected, eventually entered into a compromise with him. The material parts of the agreement, after reciting that each party was jointly interested in a loan society called the "Middlesex Loan Society," and that the insolvent had advanced 150*l.*, and the two others a much larger sum, and that they had entrusted the insolvent with various sums to lend out on security of promissory notes, were as follows: "And whereas a portion of the moneys so handed over to the said Benjamin Ulph have from time to time been repaid by the said Benjamin Ulph into the hands of the said William Jackson and Charles Hart, but there is a considerable sum in arrear, amounting to the sum of 732*l.* 18*s.* 10*d.*; and whereas the said Benjamin Ulph states that the sum aforesaid is due from parties known only to him alone, and from whom no security has been given, and that having trusted them on his own responsibility, he is willing to enter into an arrangement for the gradual liquidation of the aforesaid sum by weekly instalments." The agreement then proceeded to provide for the repayment, by instalments of 2*l.* per week; and further that the 150*l.* advanced by the insolvent should be retained by his partners; and that if default was made in keeping up the instalments, the partners were to be at liberty to sign judgment for 50*l.* The arrangement being completed, the insolvent resumed his position in the society, except so far that he was no longer a partner; and various sums were again entrusted to him to advance to borrowers; but shortly afterwards, being unable to account satisfactorily for two loans — one of 50*l.*, and one of 25*l.*, no further moneys were placed in his hands. Only three instalments were paid in pursuance of the agreement, and the instalments being much in arrear, judgment was signed against him, and having been arrested on the 19th of July 1855, he now appeared for a discharge under 1 & 2 Vict. c. 110.

Several of the notes deposited by the insolvent with the society were produced, and he was examined respecting the names upon them, and also respecting the names of alleged borrowers who had given no security, but beyond asserting that the signatures were authentic, he scarcely gave any information; and he was unable

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE BENJAMIN  
WALTER  
ULPH.

*Statement.*

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE BENJAMIN  
WALTER  
ULPH.  
*Argument.*

to say when, how, or where the loans were made. His brother, however, whose name appeared on several of the notes, now as "Henry Hicks," then as "Henry Hicks Ulph," swore the other names were "dummies;" and he stated, moreover, he had placed his name to them without consideration, and simply to oblige his brother.

*Sargood*, for the opposing creditors, after commenting on the above facts, urged that the debt owing to Messrs. Jackson and Hart had been contracted fraudulently and by a breach of trust.

*Nichols*, for the insolvent, contended that the opposition could not be supported, inasmuch as the debt complained of was contracted at a period when the insolvent was a partner and had an equal right with the opposing creditors to control and use the funds, and that, supposing a fraud had been committed, the creditors had waived it by their agreement with the insolvent. They were well acquainted with the whole of the facts when the agreement was executed, and having made a bargain, under which they obtained the insolvent's 150*l.*, and received three instalments, they had deprived themselves of the right to complain.

*Judgment.*

**THE CHIEF COMMISSIONER.** The learned counsel for the insolvent urges a condonation, but I do not find it in the agreement. The insolvent there admits that he has received 732*l.*, and that he has lent it to persons known only to him, and from whom he has received no security, and he is willing to repay it by instalments; but all know why that agreement was entered into, and why the creditors consented to receive by instalments the sum so fraudulently obtained from them. The insolvent had threatened to write to the borrowers and direct them not to pay; and he had told the creditors that 500 bills were out, and he only could prove the signatures. The arrangement then entered into with him is called an acquiescence in his fraud; but what was the result? In a week or so he resumes his fraudulent practices. As to the partnership, there is none; there was once, but now there is a legal debt, the proof of which none can object to. It seems to me that the case is one of the most dishonest and treacherous that I have ever heard. Month after month, and year after year, the same deceitful system is practised, and the confidence of those who trusted the insolvent abused. He has no interest in the society now; it would have been well if he never had any. He has taken out of it more than his share. He tells them he has invested, and gives one name — no surety — no note — no address. Of what use was that? Did they acquiesce in it? He



is entrusted with property to invest, and he refuses to say what has become of it. He is asked for information, and required to give up the notes; his only answer is an excuse. Did his partners acquiesce in that? We all know how a deceitful, plausible man will acquire a power over his friends, and continue to defraud them, simply because they do not like to tell him their suspicions of his dishonesty. It is an awkward matter to tell a man we have trusted he is dishonest for the first time. The creditors present a long list of his frauds. In some instances they are told who the pretended borrowers are, and where they reside; in other instances a name only is given: and we may be sure that if the loans are found to be fictitious where the names are given, there is not much honesty in those transactions where the addresses are concealed. Some of the borrowers and some of the sureties are described as living at a particular place; but although the brother has lived there for years, he admits he has never heard of their existence. The insolvent will be discharged in thirteen calendar months from the vesting order, for contracting the debt of the opposing creditors fraudulently.

Remanded accordingly.

Attorneys: *Strong*; and *Bradley*.

1855.  
COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

RE BENJAMIN  
WALTER  
ULPH.

*Judgment.*

## RE JOHN ROBERTS.

Before THE CHIEF COMMISSIONER.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

*Sept 17.*

IN June 1854 the insolvent had married a Mrs. Roberts, who carried on business as a dealer in coal. After the marriage the business was continued by the insolvent. The opposing creditors had supplied Mrs. Roberts with coal, and at the period of the marriage there was owing to them on that account 30*l*. This debt was reduced by the insolvent from time to time, and in the month of September following the balance stood at 4*l*. 3*s*. 6*d*. From that date to the 30th of June 1855, the day of the arrest, the debt again increased. On the 1st of April it amounted to 40*l*. 2*s*. 6*d*., on the 1st of May to 52*l*. 5*s*. 5*d*., and on the 30th of the same month it had increased to 60*l*. The balance now owing was 61*l*. 6*s*. 5*d*. On the 1st of June in this year the

R., having dealt with his opposing creditors for many months, and paid them a large sum of money, increased the balance owing to them towards the end of the dealings, and two days before his arrest on the 30th of June, received from them goods to the amount of 13*l*. On the 1st of the same month he had disposed of his horses and cart by which the business was carried on, and appropriated most of the proceeds in repaying a loan to a friend. Held, that these facts disentitled him to a discharge forthwith, and he was remanded for fourteen weeks under the discretionary clause.

1855.  
COURT FOR  
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OF INSOLVENT  
DEBTORS.

RE JOHN  
ROBERTS.

*Argument.*

insolvent had disposed of two horses and a cart, and from the proceeds he had paid a Mr. Everett 30*l.* on account of a sum of 33*l.* previously advanced. He admitted this payment was a voluntary act, and without pressure from Everett. He still continued to deal with the opposing creditors, and, two days before the arrest, received from them coal to the value of 13*l.* He alleged he had paid them 500*l.* during the dealings.

*Nichols*, on behalf of the opposing creditors, called attention to the manner in which the debt had latterly increased, and particularly to the fact of the insolvent's having received the 13*l.* worth of coal two days before his arrest. He also charged the insolvent with having been guilty of a fraudulent preference in paying the 30*l.* to Everett.

*Judgment.*

THE CHIEF COMMISSIONER. The learned counsel very fairly admits that his clients have acted indiscreetly in giving to the insolvent so large a credit. If a man with his eyes open allows another to increase his account, notwithstanding that he gets more backward in his payments every day, we may be sure the dealing will result in a loss. The complaint here is limited to the latter part of the dealing, and the account certainly did increase rather rapidly towards the end, when the insolvent stops his business; that is, he sells all that he has, and gives the money to his friend Mr. Everett. That, at all events, was not fair, and the insolvent ought not to have received the 13*l.* worth of coal afterwards. He will be discharged in fourteen weeks from the date of the vesting order under the discretionary clause.

Remanded accordingly.

Attorneys: *Fearnley*; and *Doyle*.

COURT FOR  
RELIEF  
OF INSOLVENT  
DEBTORS.

Sept. 19.

M., having applied to be discharged on bail under sect. 38. of 1 & 2 Vict. c. 110., was unable to appear through illness on the day appointed for considering the application.

*Held*, that the Court could proceed in his absence, and the sureties being approved of, the application was granted.

## RE ENEAS RICHARD MAUGHAM.

Before THE CHIEF COMMISSIONER.

THE insolvent, a petitioner under 1 & 2 Vict. c. 110., had applied to be discharged on bail, and this day was fixed for considering the application. The insolvent did not appear, but a certificate from the surgeon to the Queen's Prison was handed to the Court, setting forth that his absence was occasioned by illness. There was no opposition to the application.

THE CHIEF COMMISSIONER, having examined and approved of the proposed bail, ordered a discharge to issue to the day of hearing.

Attorney: *Collins*.

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TO

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### ACCOMMODATION BILLS.

#### ACCOMMODATION BILLS.

The mere fact of negotiating an accommodation bill does not amount to a representation that it is accepted for value.

That a bankrupt has dealt in accommodation bills is a circumstance calling for a full and satisfactory explanation; but is not necessarily a circumstance to affect him on the question of his certificate.

Every transaction of this nature is to be judged of by its circumstances, the main question being how far the bankrupt had reason to conclude that he could discharge his liability under the bills as they became due.

The Court does not, in general, favour the granting of a certificate with a condition which leaves the bankrupt's after-acquired property liable to creditors to whom he was indebted before his bankruptcy. *Ex parte Hammond, re Hammond* (Lords JJ.), 42.

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#### AFFIDAVITS.

1. This Court has no power to receive affidavits in opposition to a petitioner under the Protection Statutes. *Re Mountstevens Wright* (Phillips, Com.), 97.

B. & I. — VOL. II.

### ASSIGNEE.

2. On a trader debtor summons, the affidavit of debt stated that the claim was for the value of goods deposited with the defendant for the purpose of being worked upon. Affidavit held to be insufficient, and summons dismissed, with costs. *Anon.* (Fonblanque, Com.), 91.

### ARRANGEMENT CLAUSES.

See *Set-off*.

### ARREST.

Where an insolvent is arrested between the hour of filing his petition and that in which he obtains the protection signed by the Commissioner, this Court will order a discharge. *Re Valentine Rimell* (Murphy, Com.), 59.

### ASSIGNEE.

1. Messrs. S. & Co., auctioneers, having overdrawn their account at their bankers, Messrs. C. & Co., a short time before their bankruptcy, came to a parol understanding with them that the old account should be closed, and that a new account should be opened, which was to be kept sacred against the claims of C. & Co. for the balance due to them.

S. & Co. were in the habit of drawing on the new account for general disbursements, and having received considerable sums from the proceeds of sales made on behalf of the petitioner and other customers, paid portions thereof into the new account. *Held*, that the moneys included in the new account passed to the assignees.

A sum received by S. & Co. after the bankruptcy, in respect of a sale for a customer, and paid to the official assignee, was ordered to be

M

repaid to the customer. *Ex parte Pursons, In re Shuttleworth* (Fonblanque, Com.), 4.

2. On a petition to remove an assignee for entering into an agreement with the bankrupt to compromise his debt, it being shown by the respondent that he acted under a *bond fide* belief that all the other creditors were to be equally compounded with, the petition was dismissed, with costs. *Ex parte Davison, In re Beresford* (Fonblanque, Com.), 89.

3. In an application for a revesting order under 1 & 2 Vict. c. 110, where the insolvent had wantonly created legal expenses by proceedings against the assignee and otherwise, —

*Held*, that those expenses being caused to the assignee involuntarily, he was entitled to charge them against the trust estate, and that the insolvent was not entitled to a revesting order until the assignee's account of the same had been obtained and taxed, and the balance liquidated. *Re Samuel Perkins* (Law, Com.), 137.

### ASSIGNMENT.

See *Order and Disposition*, 1, 2.

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See *Jurisdiction (Insolvency)*, 1.

### ATTACHMENT FOR COSTS.

See *Jurisdiction in Insolvency*, 1.

### ATTORNEY AND CLIENT.

See *Detaining Creditor; Jurisdiction (Insolvency)*, 5.

In 1853 the insolvent was discharged by the County Court at Maidstone under 1 & 2 Vict. c. 110, upon which occasion M. acted as his attorney, and agreed to take him through the Court for a specific sum. In 1855 the insolvent filed a petition under the Protection Statutes, and inserted M. in his schedule as a creditor for a portion of the sum before referred to. Upon the occasion of the first examination M. appeared to oppose, when his opposition was objected to, *inter alia*, that he had not complied with rule 3. of the Court respecting the taxation, &c. of his bill of costs.

*Held*, that inasmuch as the debt of M. arose out of a non-observance of one of the rules of Court, the Court would not permit him to oppose. *Re Henry Standish* (Phillips, Com.), 94.

### AUCTIONEER.

See *Assignee*, 1.; *Excepted Articles*.

### AWARD.

In an action for a tort a verdict was taken for the plaintiff for 1000*l.*, subject to a reference to arbitration. Five days afterwards the defendant was adjudged a bankrupt. Shortly afterwards the arbitrator made his certificate ascertaining

### CALCULATION OF DEBTS.

the amount of damages, the assignees not having intervened in the proceedings. The plaintiff then signed final judgment, and applied to prove under the bankruptcy for the damages and taxed costs. — *Held*, that the proof could not be admitted.

Whether, if the action had been for a breach of contract, the proof would have been admissible, *quære*. *Ex parte Todd, Re Williamson* (Lords JJ.), 131.

### BAIL.

Where an insolvent makes over his property to a particular creditor to secure his debt, this Court will not accept such creditor as a surety for the insolvent under 1 & 2 Vict. c. 110. s. 38. *Re John Hudson* (Law, Com.), 155.

### BANKRUPT'S WIFE (ACCEPTANCE BY).

See *Proof*.

### BILL OF SALE.

See *Order and Disposition*, 3.

### BONA FIDES.

See *Assignee*, 2.

### BREACH OF PROMISE OF MARRIAGE.

See *Opposition*, 7.

### BREACH OF TRUST.

J. S., one of the partners in a firm, before leaving England for America, placed in the care of the insolvent, the foreman in the business, his share of the partnership property, and agreed, in the event of his dying out of this country, or not being heard of, that the same should be given over to the insolvent. Upon these facts coming to the knowledge of T. S., the other partner, he stated to the insolvent that J. S. had no right thus to dispose of the partnership property, and directed him not to allow anything to be removed from the premises, which direction he promised to observe. On the following day, during the absence of T. S., he sold, as he alleged, two lathes which had been brought into the firm by J. S., for 7*l.* 10*s.*, which sum he subsequently paid over to T. S. On an action being brought by the firm for the value of the lathes, the jury gave 20*l.*, in addition to the 7*l.* 10*s.* already paid. *Held*, the debt was contracted by a breach of trust. *Re Richard Stanley* (Murphy, Com.), 62.

### CALCULATION OF DEBTS.

See *Petition in Insolvency*.

1. In estimating the amount of a trader's debts under the Protection Statutes, debts owing in former insolvencies, under 1 & 2 Vict. c. 110, will not be taken into consideration. *Re Benjamin Archer*, (Murphy, Com.), 20.

2. Where, in order to give jurisdiction to the County Courts, a portion of a debt has been abandoned, under s. 63. of 9 & 10 Vict. c. 95., in estimating the amount of a petitioner's debts under the Protection Statutes, the residue only will be taken into consideration. *Re James Richardson* (Phillips, Com.), 12.

3. Where an insolvent has been discharged under the 1 & 2 Vict. c. 110., and subsequently petitions under the Protection Statutes as a trader owing less than 300*l.*, in estimating the amount of his debts, those owing under the first insolvency will not be taken into consideration. *Re George Harrod* (Phillips, Com.), 71.

4. E., a petitioner for protection, having placed a phœnon in the possession of a sister shortly before the filing of his petition, accounted for the fact by stating he had sold the same to her husband two years since. The Court, believing such statement to be a stratagem to defraud the creditors of their just rights, dismissed the petition. *Re John Edwards* (Phillips, Com.), 74.

5. In estimating the amount of a trader's debts under the Protection Statutes, debts owing to mortgage creditors must be included. *Re John Furze Cockle* (Phillips, Com.), 93.

6. Where several of the creditors of an insolvent had accepted a composition in satisfaction of their debts, and had signed receipts and an agreement accordingly,—*Held*, as no release under seal had been executed, the difference between the composition paid and the amount of the debts originally owing must be taken into consideration in estimating the insolvent's liabilities, and, as the whole exceeded 300*l.*, the petition was dismissed. *Re Thomas Chance* (Murphy, Com.), 17.

## CAPIAS UTLAGATUM.

See *Jurisdiction* (Bankruptcy), 1.

## CERTIFICATE.

1. In 1836 C. petitioned this Court under 7 Geo. 4. c. 57., and was discharged. In 1854 he was adjudicated a bankrupt, and obtained his certificate.—*Held*, that the certificate in bankruptcy did not discharge and satisfy the debts owing under the insolvency. *Re Horatio Clagett* (Murphy, Com.), 101.

2. The granting a certificate by the Commissioner under section 225. of the Bankrupt Law Consolidation Act is a judicial act, and if not bound, he is, at all events, at liberty to look at the nature of the deed, and to refuse his certificate if it is not of the nature contemplated by the Act, though it has been executed by the requisite number of creditors.

*Per the Lord Justice Turner*, a deed of arrangement is not such as is required by the Act, unless the whole property of the debtor is unequivocally given up for the payment of his debts in all events, and not merely upon a contingency. *In re Wilkes, Ex parte Wilkes* (Lord JJ.), 47.

3. Ship and insurance brokers and emigration agents traded without capital, by purchasing ships and mortgaging them to the vendors and others, in expectation of being able to pay for them out of the profits of the voyages, and con-

tinued to do so after they had dishonoured bills of exchange.

They also received passage money from emigrants, but were unable to dispatch the ships, for want of stores and provisions. Certificate suspended for three years, six months to be without protection; the certificate to be of the third class. *In re Griffiths and Newcombe* (Fonblanque, Com.), 116.

## CITY SMALL DEBTS COURT.

See *Jurisdiction* (Bankruptcy), 3.

## COSTS OF WITNESS.

See *Practice in Bankruptcy*, 6.

## COUNTY COURT.

See *Protection*.

## COVENANT.

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## CREDITORS' ASSIGNEE.

The Court will not, unless under very special circumstances, appoint a female to the office of creditors' assignee. *Re Joseph Kent* (Phillips, Com.), 77.

## DEED OF ARRANGEMENT.

See *Certificate*, 2.

## DESCRIPTION.

See *Petition in Insolvency*.

1. Where an insolvent fails to describe himself as of all the places where he has resided during the six months immediately preceding the filing of his petition, the petition will be dismissed. *Re Francis Pearce* (Phillips, Com.), 17.

2. The insolvent described himself as a manager to an insurance company. He had been engaged in that capacity by two insurance companies, but he had not described himself specifically of either. *Held*, the description was insufficient, and petition dismissed. *Re Charles William Bevan* (Murphy, Com.), 76.

3. Where an insolvent fails to describe himself as of all the places where he has resided during the six months next immediately preceding the date of his petition, the petition will be dismissed. *Re William Bennett* (Murphy, Com.), 72.

4. Where an insolvent fails to describe himself as of all the businesses he has followed during his six months' residence within the jurisdiction of the Court, the petition will be dismissed. *Re George Green* (Phillips, Com.), 155.

5. The insolvent had described himself as a gas-fitter, and, as a gas-fitter to the Italian Opera, he had acted in the same capacity to the Sadler's Wells Theatre.—*Held*, that his description, which omitted his engagement with the theatre, was sufficient. He had let lodgings

## 164 DETAINING CREDITOR.

upon one occasion to one person, and a debt was owing to the estate on that account. — *Held*, that he was not a lodging-house keeper. He had petitioned as John Drake Palmer the Younger, but his signature at the foot of the petition omitted the words "the Younger." — *Held*, that the signature was sufficient. *Re John Drake Palmer* (Murphy, Com.), 92.

6. The insolvent had described himself in his petition and schedule as Christian Ditford, his real name being Christian Ditfort, in which he had signed the said documents. — *Held*, that the Court could not entertain the petition. *Re Christian Ditfort* (Phillips, Com.), 95.

7. Where an insolvent fails to describe himself according to the business or occupation he follows, the Court will dismiss the petition. F., a fisherman, was the owner of twelve fishing smacks, which he used for the purposes of that pursuit, and occasionally, when there was room to spare, he brought home the fish of other persons, and was paid for the conveyance: *Seem*, that the ownership of the smacks, and the occasional conveyance of fish for other persons for a profit, would not constitute a trading within the meaning of the Bankrupt Laws as a shipowner or a carrier. *Re Thomas Robert Forge* (Murphy, Com.), 98.

8. A., a petitioner for protection, had accepted bills, which were directed to him at 19, Newman Street. He had never resided there, and the place was not mentioned in his description. One of the bills became due within six months of the date of his petition. — *Held*, that the description in the petition was sufficient. Secondly, that the description in the schedule was defective, and the insolvent was ordered to readvertise. *Re Wm. Hy. Acret* (Murphy, Com.), 135.

## DETAINING CREDITOR.

C., who had given a Judge's order in 1847, for the payment of a sum of money, was arrested in 1853 for a balance then owing upon the same. In 1847 the detaining creditor's attorney was T., but in 1853 L. acted for him, and obtained a vesting order against C. T. was inserted in the schedule as the attorney to the detaining creditor, and served with a copy of the order for hearing. The detaining creditor claimed notice for L. — *Held*, the notice on T. was sufficient. *Re Wm. P. Carter* (Phillips, Com.), 58.

## DISCHARGE.

*See Arrest; Jurisdiction of Insolvent Court; Protection.*

Where an insolvent is arrested by a creditor (whose debt is inserted in the schedule) after the filing of his petition and schedule, and the issue of the interim order, but before it reaches him, this Court will order a discharge. *Re William Lee* (Murphy, Com.), 19.

## DISCHARGE ON BAIL.

Where on an application for a discharge on sureties no ground for a remand appears on the face of the proceedings, the Court will not receive evidence of an alleged offence, but will grant the indulgence of a discharge on bail. *Re George Taylor Brown* (Murphy, Com.), 21.

## JUDGMENT CREDITOR.

### EQUITABLE MORTGAGEE.

*See Order and Disposition*, 1, 2.

### EXAMINATION ON OATH.

*See Jurisdiction (Bankruptcy)*, 2.

### EXCEPTED ARTICLES.

Sect. 9. of 7 & 8 Vict. c. 96. enacts, *inter alia*, "that the wearing apparel, bedding, and other necessities of the petitioner and his family, and the working tools and implements of the petitioner, not exceeding in the whole the value of 20L., may be excepted by the petitioner from the operation of the Act." A publican, having petitioned, was allowed by the broker to the Court under this section a beer-engine, counter, and other fixtures, which the auctioneer to the Court subsequently removed for the benefit of creditors: *Held*, that the auctioneer was justified in so doing, the articles not being within the meaning of the above section. *Re William Fern Castle* (Murphy, Com.), 18.

### FALSE ENTRIES.

C., a petitioner for protection, having made false entries in his special balance sheet respecting the receipt and payment of a sum of money, the petition was dismissed. *Re Robert Combes* (Murphy, Com.), 79.

### FELONY.

*See Proof.*

### FINAL ORDER.

*See Jurisdiction (Insolvency)*, 4.

### FRAUD.

*See Petition in Insolvency*, 2.

### FRAUDULENT PARTING WITH PROPERTY.

*See Petition in Insolvency*, 4.

### INTERIM ORDER.

*See Jurisdiction in Insolvency*, 4.

### JOINT AND SEPARATE ESTATE.

*See Order and Disposition*, 4.

## JUDGMENT CREDITOR.

A judgment creditor who has taken his debtor in execution is not thereby precluded from filing a petition for adjudication formed on the judgment, after the debtor's discharge under the Insolvent Act, such discharge not being with the consent of the creditors. *Re Ephraim Watson, Ex parte Humphreys* (Holroyd, Com.), 51.

## JURISDICTION.

See *Affidavits*, 1.

## I. — Bankruptcy.

## II. — Insolvency.

## I. — Bankruptcy.

1. The Court has jurisdiction to discharge from custody a bankrupt detained on a *capias utlagatum* founded on a judgment in an action on bills of exchange. *Ex parte Metcalfe* (Evans, Com.), 3.

2. The Court has jurisdiction, under a petition for arrangement, to compel a witness to be examined upon oath, if such examination involve the inquiry whether the petitioning debtor has made a full and true disclosure of his debts and effects, as required by section 223. In determining upon the jurisdiction to examine a party summoned, the form of the summons is immaterial, when the witness is in fact before the Court ready to be examined. *In re —, an Arranging Debtor* (Evans, Com.), 1.

3. The Court of Bankruptcy has no power to discharge from custody a bankrupt committed to prison by the City Small Debts Court for nonpayment of a judgment debt, although the bankrupt had obtained protection previous to the committal. *In re Austin* (Fonblanque, Com.), 22.

## II. — Insolvency.

1. D. being in custody upon an attachment for contempt for the nonperformance of a particular act in a suit between himself and L., the latter lodged a distinct detainer and attachment for costs. *Held*, that the costs being a debt, the lodging of a detainer distinct from the attachment for contempt gave to this Court jurisdiction to hear the case, and adjudicate thereon so far as the debts were concerned. 2ndly, a case of fraud having been made against the insolvent, he having received 100*l.* as the consideration for granting a lease, and having afterwards refused to execute the same, and the costs in question having arisen on a claim in Chancery for specific performance, and the attachment in question being for non-performance of the decree, this Court would not adjudicate until it saw what became of such attachment, and adjourned the case generally. *Re Stephen Dana* (Murphy, Com.), 60.

2. Where an insolvent has been discharged under 1 & 2 Vict. c. 110., and is subsequently committed on a judgment for the nonpayment of a debt which is set out in the schedule, this Court has no power to grant a discharge. *Re Alfred Joseph Christy* (Murphy, Com.), 70.

3. Where a petitioner for discharge, whose hearing was fixed for the 23rd of January, was discharged by his detaining creditor on the 21st of the same month, — *Held*, that the Court had no power to adjudicate. *Semble*, the Court will adjudicate where the period between the lodging of a discharge and the time appointed for the hearing does not exceed twenty-four hours. *Re Louis Urban* (Murphy, Com.), 32.

4. C., having been arrested on a *capias*, was discharged on bail. Subsequently the action was tried against him, and a verdict found for the plaintiff, upon which the defendant filed his petition under the Protection Statutes, and subsequently surrendered to prison in discharge of his bail.

Upon an application to this Court for his discharge *ad interim*, — *Held*, that this Court had no power to interfere.

C. afterwards obtained his final order. — *Held*, that this Court had power to order a discharge, having granted the final order.

*Held* also, by Mr. BARON ALDERSON, at chambers, that the final order protected the insolvent, and a discharge ordered. *Re Edward Chabert* (Murphy, Com.), 133.

5. The petition of a prisoner purported to be subscribed by him in the prison in which he was confined, and there attested by his attorney. It was proved that the petition was subscribed by the insolvent before the arrest was effected, and that his attorney was not then present. — *Held*, that the Court had no jurisdiction, and the petition was dismissed. *Re William Abrey* (Law, Com.), 136.

## LIEN.

M., a sculptor, made designs and casts, which he desired to be executed in gutta percha, prior to having them coated with metal. For that purpose he delivered them to T., who found the materials and labour. The work was carried on in a portion of the bankrupt's premises, divided from that used by himself. The figures were cast in gutta percha, and were worked on by men employed by T. and by M. at the same time.

*Held*, that T. had a lien on those which were unfinished at the time of the bankruptcy. *Ex parte Thorne, Re Monti* (Fonblanque, Com.), 54.

## NOTICE.

See *Detaining Creditor; Practice (Bankruptcy)*, 1.

## OPPOSITION.

See *Practice in Bankruptcy*.

1. The Court will not require a creditor to prove his debt for the purposes of an opposition, where the same is admitted in the schedule, and judgment obtained against the insolvent. *Re Samuel Hinds* (Murphy, Com.), 8.

2. Where a creditor threatens an insolvent with opposition unless his debt be renewed, the Court will not permit such creditor to be heard. *Re Ed. Batty* (Phillips, Com.), 17.

3. H., a creditor having visited the insolvent in prison in order to effect a settlement of his debt, and having threatened to oppose unless his terms were complied with. It was objected at the hearing that H. ought not to be permitted to oppose. — *Held*, that this Court had no right to refuse his evidence, and he having made out a case against the insolvent, the Court ordered a remand at his suit. *Re Charles Watt* (Law, Com.), 143.

4. A creditor having been plaintiff in an action to recover money received on his account, the defendant pleaded, by way of set-off, payments made in Australia, on account of the plaintiff, and applied for a commission to examine witnesses, whereupon the plaintiff, under a Judge's order, admitted such payments to have been made, and went to the jury on the question only whether they could be charged against the plaintiff, under

the agreement between the parties. A judgment being recovered for the plaintiff, and the defendant becoming an insolvent, — *Held*, that the plaintiff, as an opposing creditor, was not, by his admission in the action, precluded from inquiring under the insolvency whether the payments so admitted had been in truth made by the insolvent, as, if not, assets may exist applicable to a dividend. *Re Michael H. Myers* (Phillips, Com.), 8.

5. Where an insolvent had inserted a society in his schedule as debtors who appeared to deny and to complain of such insertion, — *Held*, that creditors only could be heard, and opposition disallowed. *Re Robert George William Wear* (Phillips, Com.), 13.

6. Where a creditor endeavours to make terms for himself, and threatens an opposition unless those terms are complied with, the Court will not permit him to oppose. *Re H. J. Broad* (Phillips, Com.), 13.

7. Where an insolvent is opposed on the ground of a breach of promise of marriage, this Court will not rehear the case, but will estimate the length of the remand by considering the situation in life of the parties to the action, and the amount of damages recovered. *Re William Mole* (Murphy, Com.), 72.

8. The insolvent, in conjunction with two others, established a loan society, and afterwards received from his partners various sums to advance to borrowers, which he appropriated to his own use. The fraud being discovered, and his partners fearing to be unable to recover outstanding loans without his assistance, an arrangement was come to by which his interest in the funds of the society was to be retained by his partners, and the sum appropriated repaid by instalments. The insolvent was afterwards employed by the society, and paid three instalments, in pursuance of the agreement. Subsequently, some new misconduct being discovered, he was discharged, and, the instalments being in arrear, arrested. Having petitioned this Court, and being opposed by his late partners on the ground of fraud, —

*Held*, that the creditors had not waived their right to complain of the fraud by entering into the arrangement with the insolvent, and that a good debt existed upon which to rest the opposition. *Re Benjamin Walter Ulph* (Law, Com.), 156.

## ORDER AND DISPOSITION.

1. The bankrupt was a shareholder and director of the East and West India Dock and Imperial Fire Insurance Companies. Long prior to the adjudication he assigned by deed to the petitioner his shares and interest in those companies to secure an advance of 2000*l*. The assignment was not entered in the books of either company, as required by their respective rules; and no notice was given to either company until immediately before the bankruptcy, the petitioner being unwilling to deprive the bankrupt of his qualification as a director; but upon its becoming known that bankruptcy was inevitable, and a few days before the act of bankruptcy was committed, the petitioner gave notice of the assignment to both companies. — *Held*, that the shares were in the order and disposition of the bankrupt, and

## PARTING WITH PROPERTY.

passed to the assignees. *Ex parte Littledale and Mildred. In re Pearse* (Goulburn, Com., Fonblanque *adjuvante*), 23. (*Vide next case*).

2. The bankrupt had been a shareholder and director of the East and West India Dock and Imperial Fire Insurance Companies. Nearly eight years prior to the adjudication, the bankrupt assigned by deed to the petitioner his shares and interest in those companies, to secure an advance of 2500*l*. The shares were never transferred to the petitioner, as required by the Dock Acts and the deed of settlement of the Insurance Company, but both the Dock and Insurance Companies had notice of the assignment eight days before the commission of an act of bankruptcy by the assignor.

*Held* (reversing the decision of the COMMISSIONER) that the petitioner was to be regarded as an equitable mortgagee of the shares, and entitled to the common order for sale.

That the shares ceased to be in the order and disposition of the bankrupt, with the consent of the true owner, as soon as notice was given to the Dock and Insurance Companies respectively. *Ex parte Littledale, Re Pearse* (Lord C. and Lords JJ.), 33.

3. Chattels transferred by bill of sale, but in the possession of the bankrupt at the time of the bankruptcy, pass to the assignees, notwithstanding that the bill of sale was duly registered under the Act 17 & 18 Vict. c. 36. *Ex parte Ashley, In re Robert Daniel* (Holroyd, Com.), 124.

4. C. and S. carried on business in partnership under the style of C. and Co. C. afterwards retired from the firm with the knowledge of the joint creditors; the dissolution was advertised, and S. continued the business in his own name. He was afterwards adjudicated a bankrupt. *Held*, that the partnership property was in the order and disposition of the bankrupt, and belonged to his separate estate. The petition of joint creditors to be at liberty to prove against the partnership property dismissed. *Ex parte Fisher, In re Stewart* (Fonblanque, Com.), 87.

## PARTING WITH PROPERTY.

1. Where an insolvent disposes of his estate to one creditor, and subsequently applies to the Court for protection against the rest, his case will be adjourned *sine die*. *Re John Desire Cremmens*, (Phillips, Com.), 15.
2. Where an insolvent distributes his property, and shortly afterwards applies for protection, the Court will adjourn his case *sine die*. *Re John Buckworth Herne Soame* (Murphy, Com.), 14.
3. Where a petitioner for protection parts with or charges property, except for the necessary support of himself and family, and the necessary expenses of his petition, or in the ordinary course of trade, within three months of the date of filing his petition, the petition will be dismissed. *Re Robert Hall* (Phillips, Com.), 73.
4. R., having dealt with his opposing creditors for many months, and paid them a large sum of money, increased the balance owing to them towards the end of the dealings, and two days before his arrest on the 30th of June, received from them goods to the amount of 13*l*. On the 1st of the same month he had dis-posed



of his horses and cart by which the business was carried on, and appropriated most of the proceeds in paying a loan to a friend.

*Held*, that these facts disentitled him to a discharge forthwith, and he was remanded for fourteen weeks under the discretionary clause. *Re John Roberts* (Law, Com.), 159.

The same point was decided by Phillips, Com. in *Re James Marshall*, 78.

And by Murphy, Com., in *Re Edward Butler*, 150.

## PARTNER.

See *Opposition*, 7.; *Order and Disposition*, 4.

## PETITION FOR ADJUDICATION.

See *Judgment Creditor*.

## PETITION IN BANKRUPTCY.

See *Order and Disposition*, 4.; *Stoppage in transitu*.

## PETITION IN INSOLVENCY.

See *Description*; *False Entries*.

1. Where an insolvent, who has obtained his final order, contracts fresh debts,—

*Held*, that he cannot afterwards file a second petition, under the Protection Statutes. *Re James Shaw, Re Francis Robert Leaver* (Murphy, Com.), 126.

2. The insolvent having contracted debts with two opposing creditors by means of fraud and false representations, the petition was dismissed. *Re Wm. King* (Murphy, Com.), 31.

3. M., who had been travelling on the Continent for a period of eighteen months, returned to England, and, five weeks afterwards, applied for leave to file a petition under sect. 8. of 10 & 11 Vict. c. 102. *Held*, that he was not entitled to petition under that section, and the application was refused. *Re Reuben Michael* (Law, Com.), 111.

## PRACTICE.

See *Transfer of Petition*; *Uncertificated Bankrupt*.

I.—Bankruptcy.

II.—Insolvency.

## I.—Bankruptcy.

1. The assignees of a bankrupt are at liberty to oppose the granting of the certificate without giving notice, although their opposition is in respect of a complaint peculiar to themselves as individual creditors. *In re Rowley* (Holroyd, Com.), 3.

2. A trader debtor summons (12 & 13 Vict. c. 106. s. 78. *et seq.*) must be served four days at least before the time for appearance, exclusive of the first, and exclusive of the last day. *Anon.* (Fonblanque, Com.), 53.

3. Service of notice of motion on the solicitor of the party to be affected by the motion, where such person will not be personally affected by the order sought for, is sufficient. *Ex parte Digan, Re Reade* (Fonblanque, Com.), 86.

4. A petitioning creditor did not proceed with

the adjudication within three days. Another creditor sought to proceed with the adjudication, and proved his debt, &c., but did not attend the Court, having obtained an order, under rule 12., dispensing with his personal attendance. The original petitioner subsequently filed an affidavit of debt, but did not attend the Court, or obtain an order under rule 12. His affidavit was ordered to be taken off the file. *Quere*, can a petitioning creditor proceed with the adjudication after three days, not having obtained an extension of time. *Re Bridges* (Fonblanque, Com.), 85.

5. A trader who, on being served with a trader debtor summons, has appeared and admitted the debt, cannot, within the seven days limited by the 81st section of the Bankrupt Law Consolidation Act, defeat the creditor's proceedings by obtaining an order for protection from process under the arrangement clauses. The creditor, however, must prosecute his proceedings with due diligence; and, *semble*, an unexplained delay of eighteen days from the expiration of the seven days to the filing the petition for adjudication, would be a bar to his proceeding to adjudication. *Ex parte Walker, Re Haywood* (Lords JJ.), 145.

6. *Semble*, that where a person supposed to have property belonging to the bankrupt in his possession, is summoned to be examined touching such property, the object for which he is to be examined ought to appear on the face of the summons.

The costs of a witness summoned as above must abide the result of any proceedings relative to the property in question. *In re Cole* (Fonblanque, Com.), 115.

7. In serving a summons issued under sect. 78. of the Bankrupt Law Consolidation Act, it is not necessary to leave with the person served an original of the summons, but it is sufficient to show him the original, and leave with him a true copy.

If the copy so left does not contain the signature of the Commissioner it is not a true copy, and the service is irregular. *Ex parte Tindal* (Lords JJ.), 129.

## II.—Insolvency.

1. T., who had filed a petition under the Protection Statutes, applied for its dismissal, and supported the application by producing a consent in writing, signed by each of his creditors. — *Held*, that there must be a release, and the application refused. *Re William Albert Tarlton* (Phillips, Com.), 78.

2. M., having applied to be discharged on bail under sect. 38. of 1 & 2 Vict. c. 110., was unable to appear through illness on the day appointed for considering the application. *Held*, that the Court could proceed in his absence, and the sureties being approved of, the application was granted. *Re Eneas Richard Maugham* (Law, Com.), 160.

## PRISONER.

The Court of Bankruptcy has jurisdiction to release from custody a bankrupt who has been taken in execution under stat. 12 & 13 Vict. c. 106. s. 257., after he has remained in prison for twelve months. *Re Barnshaw* (Evans, Com.), 88.

## PROOF OF ADMITTED DEBT.

See *Opposition*, 1.

## PROOF.

See *Award*.

1. Proof on a bill of exchange accepted by bankrupt's wife rejected. *In re* ——— (Court of Bankruptcy), 70.

2. The bankrupt, besides his trading, was employed by A. B. to collect and pay moneys. On the death of A. B. his executors discovered that the bankrupt was in default; and, after pointing out to the bankrupt that he had made himself liable to a prosecution, they induced him to convey to them his stock-in-trade, &c., as a security for the default. The security, when realized, was insufficient to pay the whole default, and on a proof being tendered for the residue, the Court would not presume that a felony had been committed, and the proof was admitted. *Ex parte Mühner, Re Webb* (Fonblanque, Com.), 57.

## PROTECTION.

See *Parting with Property*, 1.

1. Where an insolvent is committed to prison by the order of a County Court for the nonpayment of a debt which is set out in the schedule, and the order for committal is subsequent to the date of the final order, this Court will grant a discharge. *Re James Hobbs* (Murphy, Com.), 7.  
[The same point was decided by the same learned Commissioner in *Re J. B. Addis*, 60. *See vide Ex parte Somers*, 3 Com. Law Rep. 851., where it would seem that these decisions of the Insolvent Courts have been overruled in all the Superior Courts at Westminster Hall.—Ed.]

2. Where an insolvent is committed to prison by the order of a County Court upon a judgment summons between the dates of his interim order and final order, for the nonpayment of a debt which is inserted in the schedule, and in respect to which he is protected from process, this Court will grant a discharge. *Re John Messenden* (Murphy, Com.), 71.

3. On the 16th of May, J., being protected from process by an order of this Court, appeared at a County Court in obedience to a judgment summons, which had been issued against him at the suit of a creditor whose debt was set out in the schedule. He then exhibited his protection to the Judge, who, notwithstanding, ordered him to be committed for thirty-five days. On this order J. was subsequently arrested. The warrant set out that he was personally served with the summons, but did not attend, whereupon he was ordered to be committed for thirty-five days. J. having moved this Court for a discharge, and denied by affidavit the truth of this statement, the Court granted a rule to show cause, and the judgment creditors presenting no facts in answer to the affidavit, the Court ordered a discharge. *Re Charles Jecks* (Law, Com.), 151.

4. Where an insolvent becomes security for other persons at a period when he is unable to pay his own debts, the Court will refuse an immediate protection. *Re Henry James Rolfe* (Phillips, Com.), 16.

## STOPPAGE IN TRANSITU.

## RELEASE.

See *Practice (Insolvency)*, 1.

## REMAND.

See *Parting with Property*, 4.

## REPAYMENT OF LOAN.

K., having borrowed 60*l.* for the purposes of his business, repaid the loan within three months of the date of his petition. *Held*, the payment was within the meaning of the words, "in the ordinary course of trade." *Re Henry David King* (Murphy, Com.), 96.

## REVESTING ORDER.

See *Assignee*, 3.

## SCHEDULE.

See *Description*, 1. 6. 8.; *Opposition*, 1. 5.

## SCRIVENER.

A few money transactions incidental to some other business, are not within the meaning of the Bankrupt Laws.

But the number and extent of such transactions, where they are carried on with the intention of gaining a profit in the regular way of business, will not affect the operation of the Bankrupt Laws, where it is contended that such transactions were incidental to some other business not within the scope of the Bankrupt Laws. The intention in carrying them on must be gathered by their extent as compared with that of the other business, and the mode in which they were transacted. *Re Lane* (Lords JJ.), 146.

## SCULPTOR.

See *Trader*.

## SERVICE.

See *Practice (Bankruptcy)*, 2, 3, 7.

## SET-OFF.

The right of set-off exists under the arrangement clauses of the Consolidation Act of 1843, as in bankruptcy. *In re C. and G.* (Fonblanque and Holroyd, Coma.), 81.

## SHIP-OWNER.

See *Trading*, 3.

## STOPPAGE IN TRANSITU.

Where consignors claim cargo in the possession of the assignees of the consignee (who became bankrupt during the voyage) in respect of an alleged stoppage *in transitu*, the time and manner of the stoppage must be shown.

A statement in the petition of the consignors

## SUMMONS FOR EXAMINATION.

that the stoppage took place, verified by an affidavit in general terms that the contents of the petition are true, is not sufficient. *Ex parte Andersen, In re Manico*, (Evans, Com.), 66.

## SUMMONS FOR EXAMINATION.

See *Practice in Bankruptcy*.

## SURRENDER.

The Court will not discharge a bankrupt from custody (for debt) until he has surrendered; but the Court will order the gaoler to bring up the bankrupt to surrender, and will then order the discharge. *In re Fisher and Bassy* (Goulburn, Com.), 29.

## TRADER.

See *Description*, 8.

1. A sculptor is not a trader within the meaning of a Bankrupt Law (12 & 13 Vict. c. 106. s. 65.), but he can be made a bankrupt as a dealer in marble, and as a worker of goods and commodities. *Re Bailey* (Fonblanque, Com.), 65.

2. T. assigned certain life policies to W., and covenanted to pay the premiums. Shortly afterwards he was adjudicated a bankrupt, and obtained his certificate. He then ceased to trade. Subsequently two premiums became due, and were paid by W., who sued T. for the amount, and obtained judgment. T. then petitioned this Court under the Protection Statutes as a non-trader. *Semble*, the contract to pay being entered into during the trading of T., the debt arising upon the contract constituted him a trader. *Re Wm. Owen Tucker* (Law, Com.), 153.

3. F., a fisherman, was the owner of twelve fishing smacks, which he used for the purposes of that pursuit, and occasionally, when there was room to spare, he brought home the fish of other persons, and was paid for the conveyance. *Held*, that the ownership of the smacks, and the occasional conveyance of fish for a profit, did not constitute a trading within the meaning of

## VOID WARRANT OF ATTORNEY. 169

the Bankrupt Laws as a shipowner or a carrier. *Re Thomas Robert Forge* (Murphy, Com.), 144.

## TRADER DEBTOR SUMMONS.

See *Affidavits*, 2.; *Practice (Bankruptcy)*, 2.

## TRANSFER OF PETITION.

Where, on the *ex parte* application of a creditor, an order for the transfer of a petition for adjudication, and the proceedings thereunder, from a country District Court to the London District Court was made by one of the Registrars as deputy for one of the London Commissioners during the absence of such Commissioner, and also of the Senior Commissioner; *Quare*, whether, in the absence of circumstances showing urgency, such an order would be sustained if questioned without delay, and before any steps are taken under it. *Ex parte Bilson, Re Steele*, (Lords JJ.), 113.

## TRUE COPY.

See *Practice (Bankruptcy)*, 6.

## UNCERTIFICATED BANKRUPT.

Where an insolvent is an uncertificated bankrupt, and applies to this Court for a discharge from debts subsequently contracted, this Court, before proceeding with the case, will require a certificate from the proper officer of that Court, certifying what had been done there on the insolvent's last appearance. *Re William Edward Schottlander* (Phillips, Com.), 77.

## VOID WARRANT OF ATTORNEY.

A warrant of attorney to secure an antecedent debt, given *bonâ fide* within two months of the bankruptcy, and at a time when the bankrupt was unable to meet his engagements, and executed by levy and sale previous to the bankruptcy, is void, notwithstanding sect. 133. of 12 & 13 Vict. c. 106.

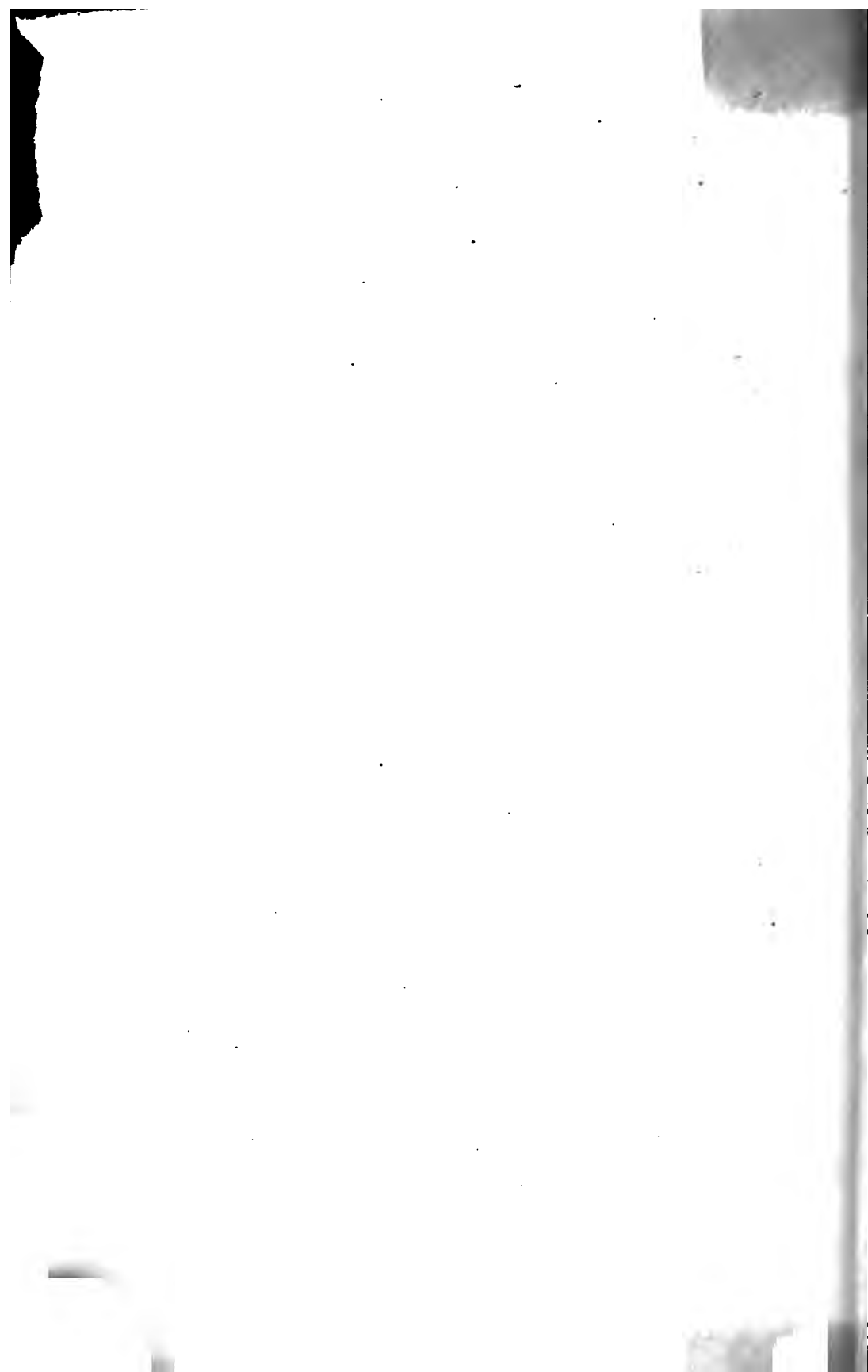
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